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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 635.

v.

No. 636.

SLAB FORK COAL COMPANY ET AL., APPELLANTS,

v.

THE NEW RIVER COMPANY ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

BRIEF FOR APPELLANTS IN No. 636.

GEORGE T. BELL,
Solicitor for said Appellants.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 627.

UNITED STATES OF AMERICA ET AL., APPELLANTS,

v.

THE NEW RIVER COMPANY ET AL., APPELLEES.

No. 628.

SLAB FORK COAL COMPANY ET AL., APPELLANTS,

v.

THE NEW RIVER COMPANY ET AL., APPELLEES.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

BRIEF FOR APPELLANTS IN No. 628.

Statement.

These cases come here upon appeals from an order and decree of the United States District Court for the Southern District of West Virginia, enjoining the Chesapeake & Ohio

Railway Company and the Virginian Railway Company from observing and applying a certain rule of coal-car distribution, and enjoining the United States of America and the Interstate Commerce Commission from attempting to enforce an alleged affirmative order of the Commission said to require the railway companies to establish, maintain and apply the rule of car distribution complained of. The order was granted on a bill filed by the New River Company and certain subsidiary companies, appellees here, operating eleven coal mines in the New River District of West Virginia served by the two railway companies named. These mines are what are known as joint mines, so called because they are served by more than one railroad.

There are frequent periods when the supply of cars available for coal loading is insufficient to meet the requirements or orders of the mine operators and consequently it long ago became necessary for carriers to maintain and apply rules for rating the shipping capacities of mines and for dividing and distributing the available cars among them. Prior to the World War there was no uniformity in these rules on the various railroads (25–26, 34*). When the railroads were taken under Federal Control during the war, the Director General prepared and promulgated a set of uniform rules, and later a revised set of uniform rules, for rating coal mines (other than anthracite) and for distributing cars to such mines during periods of car shortage (7, 34). While these rules were promulgated during Federal control, they were not adopted solely as a war measure (28).

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*The figures in parentheses are references to the pages of the printed record in No. 328.

So far as the two railways named were concerned, the uniform rules changed their former practices in two respects, pertinent here:

First: The Virginian and Chesapeake & Ohio formerly rated mines in different ways but in accordance with the shipments made by the various mines over their respective lines during some previous period. That is to say, a mine on the Virginian was given a rating based on its previous shipments via the Virginian; a mine on the Chesapeake & Ohio, a rating based on its previous shipments via the Chesapeake & Ohio. A joint mine on both roads was treated like a local mine on each road, and accordingly had two ratings (25-26, 135-136). Under the new uniform rules, which are still in effect in this respect, the rating of each and every mine is based on the total shipments made by it during the preceding month via the one or more carriers serving it. Specifically, the rating of a mine is determined by dividing the total tonnage shipped by it during the preceding month via the one or more carriers serving it by the number of hours worked in producing that tonnage and multiplying the quotient by the number of hours in the recognized work day (eight in the New River District). The result is termed the "daily rating" of a local mine, and the "GROSS daily rating" of a joint mine (18, 35–36).

Second: The Virginian and Chesapeake & Ohio formerly distributed cars to the mines in accordance with ratings determined as first above described. A joint mine served by both roads was given cars by the Virginian in accordance with its Virginian rating; by the Chesapeake & Ohio, in accordance with its Chesapeake & Ohio rating. No account

was taken by either road of the cars ordered from or furnished by the other road (25, 50-51, 135). Under the new rules, which are still in effect in this respect, a joint mine may be given cars by either road in accordance with its GROSS daily rating on both roads (21-22).

The new rules also contained provisions reading in part as follows:

> "Whenever the available car supply is such that all orders for cars cannot be filled, each mine shall be given its pro rata share of cars in accordance with the following rules:
>
> 1. The daily rating, or the daily order for cars if less than the rating, shall be the basis for car distribution.
>
> * * * * * * *
>
> 4. Each mine operator shall report to the local car distributor at 4 p. m. daily;
>
> * * * * * * *
>
> (*e*) Number of cars loaded during the day.
>
> (*f*) Number of empty cars standing over at close of day.
>
> * * * * * * *
>
> (*h*) Number of partly loaded cars under tipple at close of day.
>
> (*i*) Number of unconsigned loads on hand at close of day.
>
> (*j*) Additional number of empty cars required for loading following day.
>
> *Copies of orders for cars for a mine that is joint with any other carrier (steam, electric, or water), shall be filed with a designated representative of each*

such carrier. Such combinations must not exceed the gross daily rating of the mine.

* * * * * * *

7. The *pro rata* share of cars to which each mine is entitled * * * shall be based on its rating, or order when less than its rating." * * * (21-22).

Under the italicized provision, which is part of Rule 4, a joint mine is not permitted to order more than 100 per cent of its gross daily rating from both roads. That is to say, if a joint mine with a gross daily rating or shipping capacity of 100 cars orders 60 cars from one road, it is not permitted to order more than 40 cars from the second road on the same day. The joint mine may order its entire gross rating of cars from one road, or may split its order in any manner it may choose provided the total cars ordered does not exceed its gross daily rating.

After the termination of Federal Control (February 29, 1920), the railroads continued to maintain and apply the uniform rules, including the part of Rule 4 quoted above, which will be hereinafter referred to as the 100 per cent rule. This was done pursuant to directions of the Commission dated March 2, 1920, and April 15, 1920,* and to Section 208 (a) of the Transportation Act (41 Stat. L., 464) which required all rules and regulations in anywise affecting rates *or the value of the service rendered,* which were in effect on February 29, 1920, to remain in effect until changed by State or Federal authority(26, 35).

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*The April 15, 1920, direction of the Commission was the one involved in *Lambert Run Coal Co. v. Baltimore & Ohio R. Co.*, 258 U. S., 377.

THE COMPLAINTS TO AND DECISIONS OF THE COMMISSION.

On January 11, 1921, the New River Company and its subsidiaries filed separate complaints with the Commission against the Virginian and Chesapeake & Ohio Railways. These complaints attacked the 100 per cent rule as unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act, and unduly prejudicial to joint mines and unduly preferential to local mines in violation of Section 3 of that act. These complaints were consolidated with each other and with other complaints of a similar character and hearing had thereon. The Slab Fork Coal Company and numerous other operators of local mines in the New River District intervened in opposition to the complaints (8, 24, 67).

On June 21, 1921, Division Five of the Commission (composed of three members) decided that the 100 per cent rule was unreasonable and unduly prejudicial to joint mines and unduly preferential to local mines, and held that during future car-shortage periods the defendant carriers should distribute cars to joint mines on this basis, to wit:

> "On days when the joint mine orders cars from only one carrier it shall have cars based upon its full rating from that carrier, and on days on which it orders cars from both carriers its rating on each of such carriers shall be 75 per cent of its full rating, subject to the limitation that it shall on no day be supplied with cars in excess of its maximum rating."

No order was entered, but the carriers were asked to amend their car-service rules conformably with the decision. *Fair-*

mont & Cleveland Coal Co. v. B. &O. R. R. Co., 62 I. C. C., 269. The new rule, hereinafter referred to as the 150 per cent rule, was promptly put into effect by the defendant carriers (8-9, 24-31).

Subsequently, the intervening local mine operators filed with the Commission a petition for reconsideration, reargument and consolidation of the cases with two other and similar cases then pending for hearing. (A copy of this petition is in the record herein, pp. 85-97.) The other cases had been filed by joint-mine operators in Illinois and Indiana. Hearing thereon was had, and all six cases were set for argument before a full bench of the Commission. On December 11, 1922, the Commission (one member dissenting) handed down its decision, holding that the 100 per cent was not "in principle unjust or unreasonable or unduly prejudicial," reversing its former conclusions, and dismissing all the complaints. *Bell & Zoller Coal Co. v. B. & O. S. W. Ry. Co.*, 74 I. C. C., 433. An order was entered in all six cases, including the two instituted by the New River Company and its subsidiaries. Pertinent language in this order reads as follows:

> "These cases being at issue upon complaints, answers, and intervening petitions on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:
>
> "It is ordered, That the complaints in these proceedings be, and they are hereby, dismissed" (9, 31-42).

On January 11, 1923, the New River Company and its subsidiaries filed with the Commission a petition to reopen the two cases in which the Virginian and Chesapeake & Ohio were defendants. These roads gave notice of their intention to restore the 100 per cent rule, effective February 1, 1923, and February 10, 1923, respectively (11). The Baltimore & Ohio and Monongahela Railways, the defendants to the two complaints filed by the Fairmont & Cleveland Coal Company, restored the 100 per cent rule effective December 11, 1922, and January 4, 1923, respectively (71). The railroads defendants to the complaints filed by the Illinois and Indiana joint-mine operators (*Bell & Zoller Coal Company et al.*), not having made any change in the 100 per cent rule on their respective lines, continued the same in effect (71).

Proceedings in the Court Below.

On January 29, 1923, and before the Commission had acted on their petition to reopen, the New River Company and its subsidiaries, West Virginia corporations, filed a bill in the United States District Court for the Southern District of West Virginia against the Virginian and Chesapeake & Ohio, corporations respectively of Virginia and West Virginia, the United States and the Commission, reciting many of the facts hereinbefore stated, referring to various paragraphs of sections 1 and 3 and all of sections 22 and 23 of the Interstate Commerce Act, and alleging in part as follows:

(*a*) That the decision, ruling and order of the Commission and the 100 per cent rule constitute "an encroachment upon and curtailment and denial of the legal right of complainants to the service of a common carrier in interstate

commerce on a parity with other shippers offering similar shipments to said carrier and the carrier's legal duty and legal and property right as a common carrier to serve complainants," thereby depriving complainants and each of them of their property and legal rights without due process of law and of the equal protection of the law, etc. (13).

(*b*) That the decision, order and 100 per cent rule are discriminatory against complainants as shippers of coal in comparison with shippers of other classes of merchandise (13).

(*c*) That the decision, order and 100 per cent rule authorize and require each of two competing carriers to act in combination one with the other to refuse any transportation of goods tendered to it if tendered to the other carrier, all in violation of the laws of the United States, etc. (14).

(*d*) That the decision, ruling and order of the Commission are without warrant in law and beyond the power of the Commission, and that the operation of the 100 per cent rule will result in great loss and irreparable damage to complainants, for which there is no adequate remedy at law (15).

The bill prayed that the two railway companies, the United States and the Commission be enjoined from enforcing or applying the 100 per cent rule, and that the United States and the Commission be enjoined from enforcing the decision and order of December 11, 1923; that the 100 per cent rule be adjudged in violation of the legal rights of complainants and null and void; that the decision and order of the Commission, in so far as it authorized or required the two railway defendants to put in operation the 100 per cent rule, be

adjudged beyond the power or authority of the Commission and null and void; and that the United States, the Commission and the two carriers be perpetually restrained and enjoined from restricting transportation service to complainants in accordance with the 100 per cent rule or any other decision, order or rule to the same effect (16-17).

On February 6, 1923, the cause came on for hearing before Circuit Judges Woods and Waddill and District Judge McClintic on the motion of complainants for a temporary injunction and the motions of the United States and the Commission to dismiss the bill (43-44). The Slab Fork Coal Company and numerous other local-mine operators, interveners before the Commission, applied for and were granted leave to intervene as intervening defendants, and likewise moved to dismiss the bill (61-66). The general grounds for these motions were—

(*a*) That the order entered December 11, 1922 by the Commission was a negative order and not subject to review by the District Court.

(*b*) That the subject matter of the decision, ruling and order of December 11, 1922, is one peculiarly within the jurisdiction of the Commission, and not within the jurisdiction of the District Court.

(*c*) That the bill is without equity (43-45, 65-66).

On February 8, 1923, the court (Judge Woods dissenting), without disposing of the motions to dismiss, granted a 60-day stay order, but required complainants to put up bond in the sum of $100,000.00 to indemnify the railway defendants against possible suits for damages (46-47).

On February 5, 1923, the Commission denied complainants' petition to reopen, whereupon complainants filed a supplemental bill making reference thereto (42). Intervening defendants, without waiving their motion to dismiss, filed an answer to the bill answering each and every allegation thereof, pointing out that they are active competitors of complainants in marketing coal, and showing among other things:

(*a*) That the 100 per cent rule recognizes the right of complainants to tender the shipping capacity of their joint mines and to request transportation of either or both of the railway defendants of the coal which can be produced by the joint mines, but the rule in effect requires the joint-mine complainants, as other rules in effect require the local-mine interveners, to accompany their daily orders for cars with *bona fide* contemporaneous tenders or setting aside of sufficient productive capacity to load and ship the aggregate number of cars ordered. The 100 per cent rule recognizes the common-carrier obligation of the railway defendants to furnish cars for loading, but such obligation is not called into play unless and until orders for cars and requests for transportation by whomsoever made are accompanied by actual or constructive tenders of sufficient coal to load the aggregate number of cars ordered on the particular day for which they are ordered (73-74).

(*b*) That the complaints filed by complainants with the Commission presented no issue of discrimination as between the complainant shippers of coal on the one hand and shippers of other classes of merchandise on the other (74).

(*c*) That it is necessary and desirable for carriers serving a joint mine to exchange information regarding the orders for cars placed by joint mines in order to prevent them from placing aggregate orders for cars in excess of their respective gross daily ratings and thereby falsely to represent that they have sufficient capacity or sufficient coal ready for shipment to load a greater number of cars than the number represented by their respective ratings (75).

(*d*) That the local-mine interveners have each invested large sums of money in their coal-mining properties and in developing their mines to their present rated capacity. They are so equipped as to capital, productive and selling organizations and other facilities to produce and market the full amount of coal which could be loaded and shipped in the number of cars represented by their respective just and reasonable *pro rata* shares of the available cars if joint mines, like local mines, were compelled to accompany their orders for cars with contemporaneous tenders of capacity to load and ship all cars ordered. But because of the operation of the 150 per cent rule, intervening defendants are being deprived of their respective just, reasonable and lawful shares of the cars available for coal loading on the lines of the railway defendants, and thereby suffering great and irreparable damage (78).

The Chesapeake & Ohio and Virginian filed separate answers, the Chesapeake & Ohio giving as its reason for attempting to restore the 100 per cent rule—

> "the danger of having to successfully defend suits for heavy damages, believed to approximate as much as $5,000.00 per day, supported by a decision and a reparation order of the Commission which it is be-

> lieved would have automatically followed the failure of respondent to have observed the rule prescribed by the Commission in the Bell & Zoller Case (Article XIII, Rec. 54),

and the Virginian—

> "not because of fear and duress of the penalties that might be imposed by law, but because this respondent considers that said decision of the Interstate Commerce Commission imposed upon it an obligation to put said rule into effect" (Article X, Rec. 48).

The United States and the Commission elected to stand on their motions to dismiss and declined to plead further. The cause came on for final hearing before the same judges on March 30, 1923, on the pleadings, motions to dismiss, and certain evidence of complainants in respect to the question of irreparable injury, and on August 10, 1923, a majority of the court (Judges Waddill and McClintic) joined in a final order and decree, in which it was adjudged and decreed:

(*a*) That the order of December 11, 1923, of the Interstate Commerce Commission, whereby Rule 4 of Circular C. S. 31, Revised (100 per cent rule), is promulgated and put into effect and authorized, is without warrant in law and is null and void.

(*b*) That said order and said Rule 4 of Circular C. S. 31, Revised, promulgated and authorized thereby, are hereby set aside and annulled.

(*c*) That the United States, the Interstate Commerce Commission and the carriers defendant herein, and each of

them, are perpetually restrained and enjoined from restricting, in accordance with said order of December 11, 1922, of the Interstate Commerce Commission, and of Rule 4 of Circular C. S. 31, Revised, thereby promulgated and put into effect and authorized, the transportation rights in interstate commerce of the complainants and from so restricting said service by or through any other order or rule to the same effect.

APPEALS TO THIS COURT.

The United States and the Commission joined in the appeal in No. 627; the intervening defendants, in the appeal in No. 628. The defendant railways have not appealed.

On the record, the appellants in No. 628 contend—

1. That the 100 per cent rule does not deprive joint mines of any legal right or relieve the railroads of any common-carrier obligation either at common law or under the Interstate Commerce Act. On the contrary, the operation of the rule is required by the common law and by express provisions of the Interstate Commerce Act.

2. That, if the 100 per cent rule is not required by express provisions of the act, it is within the administrative functions and power of the Commission to prescribe.

3. That, regardless of whether the order of December 11, 1922, was in effect an affirmative prescription of the 100 per cent rule by the Commission, the District Court erred in enjoining either the order or the rule.

4. That the action of the District Court in substituting its judgment for that of the Commission has created discrimina-

tory situations wholly incompatible with the Interstate Commerce Act.

5. That the order of December 11, 1922, was in fact a mere negative order both in form and substance, a mere denial of affirmative relief sought, in respect to a question within the authority and jurisdiction of the Commission and not subject to review by the District Court.

Specification of Errors.

I.

The United States District Court for the Southern District of West Virginia erred in denying the motions to dismiss and in not sustaining the motions.

II.

The said District Court erred in entering the decree and order dated August 10, 1923, in this cause.

III.

The said District Court erred in ordering, adjudging and decreeing that the order of the Interstate Commerce Commission dated December 11, 1922, be set aside and annulled.

IV.

The said District Court erred in ordering, adjudging and decreeing that Rule 4 of Circular C. S. 31, Revised, of the defendant railway companies be set aside and annulled.

V.

The said District Court erred in perpetually restraining and enjoining the Interstate Commerce Commission, the United States of America, and the defendant railway companies, from—

> "restricting, in accordance with said order of December 11, 1922, of the Interstate Commerce Commission, and of Rule 4 of Circular C. S. 31, Revised, thereby promulgated and put into effect and authorized, the transportation rights in interstate commerce of the complainants and their so restricting said service by or through any other order or rule to the same effect."

VI.

The said District Court erred in substituting its judgment for the judgment of the Interstate Commerce Commission concerning a regulation pertaining to the distribution of cars for the transportation of coal in interstate commerce.

VII.

The said District Court erred in reaching the conclusion that it had jurisdiction of the subject-matter of this suit.

ARGUMENT.

The bill of complaint which started this controversy makes no attack upon rules 1 and 7 to the effect that, in times of car shortage, the *pro rata* share of the available cars to which each mine is entitled shall be based upon its daily rating or its daily order if less than its rating. Nor does it make any attack upon that part of Rule 4 which requires that orders for cars shall be on file with the car distributor at 4 p. m. of the day before the cars are desired for loading. Under this provision, the order of a given mine may be placed before 4 p. m., but it must remain with the car distributor and be on file with him at 4 p. m. if it is to be given consideration along with the orders of the other mines received up to and at that time. This is so because the cars available on the following day are to be divided *pro rata* among the mines; each mine is to receive that share of the available pool of cars which is represented by the percentage which its car-order on file at 4 p. m. bears to the total car-orders on file at 4 p. m.

It was the position of complainants in the court below, and we assume it will be the position of appellees here, that a joint mine has a "legal right" to tender its entire gross rating to one of two carriers at or before 4 p. m. on a given day, and tender part or all of its gross rating to the second carrier at or before 4 p. m. on the same day, the aggregate of the two tenders being more than 100 per cent of its gross daily rating, and that it is the duty and obligation of the two carriers to allot the mine *pro rata* shares of the cars available on their respective lines on the following day on the basis of tenders thus artificially inflated. The whole case of complainants, appellees here, is predicated upon this assumed "legal right"

of a joint mine and this assumed duty and obligation of a common carrier. The local-mine operators on whose behalf this brief is filed insisted throughout the proceedings before the Commission and in the court below, and shall maintain in this court, that the foregoing assumptions are wholly untenable and that the bill and the contentions of opposing counsel are based upon a fundamental error of law in respect to the common-carrier duties and obligations of railroads regarding the furnishing of cars. If the foundation of the bill is wrong, the case settles itself. The question as to what are the duties and obligations of common carriers in the premises will therefore be considered first.

I.

The Hundred Per Cent Rule Does not Deprive Joint Mines of any Legal Right or Relieve Railroads of Any Common-carrier Duties or Obligations. On the Contrary, the Rule is Mandatory upon Railroads, Both at Common Law and Under the Interstate Commerce Act, and the District Court Therefore Erred in Annulling it.

The Rule is Consistent with and in Fact Required by the Common Law.

1. It is the duty of every common carrier to receive and carry the goods of any person tendered to it for transportation. As conditions precedent to this duty and obligation of the carrier, there must be a tender by the shipper of the specific goods to be transported, the goods must be ready and fit for shipment, and the tender must be for immediate transportation. Until these conditions are complied with by the

shipper, there is no obligation whatsoever on the part of the carrier; these conditions are the steps necessary to initiate the relation of shipper and carrier. The carrier cannot be held liable for failure to discharge its obligation to furnish transportation unless the shipper can show that the relation of shipper and carrier existed, or was sought to be established, with respect to specific goods which were identified at the time of the alleged tender for shipment. If the goods are yet to be graded, classified, marked or set apart from others by the shipper, they cannot be deemed to have been tendered to the carrier for transportation. If the shipper retains any dominion over the goods, be it ever so slight, the tender is incomplete. The goods must be entirely surrendered to the carrier, they must be in the absolute possession and under the undivided control and authority of the carrier before it can be said that the duty and obligation of the carrier has attached.

Corpus Juris on Carriers, 10 C. J., Sections 54, 57.
Hutchinson on Carriers (3rd Ed.), Sections 105, 112, 119, 125, 143.
Elliott on Railroads, Sections 2210, 2213.
Little Rock & Ft. S. Ry. Co. v. Conatser, 33 Southwestern, 1057.
St. Louis, I, Mt. & S. R. Co. v. Knight, 122 U. S., 79.
Missouri Pacific Railway v. McFadden, 154 U. S., 155, 160-161.
Hannibal & St. Jo. R. R. Co. v. Swift, 12 Wallace, 262.
Pratt v. Grand Trunk Ry. Co., 95 U. S., 43.

It follows that if a shipper has only 100 cases of goods, or has the capacity to get ready for shipment only 100 cases of goods, he cannot possibly tender to one or more carriers for transportation more than 100 cases. It would be physically

impossible for the shipper to tender the same 100 cases to two different carriers at the same time. The law will not presume that these 100 cases of goods can be in two places at the same time, *i. e.,* delivered for immediate shipment to two different carriers at the same time. Nor will the law presume that two carriers can assume a contemporaneous obligation and duty in respect to the same lot of goods. If the shipper has only 100 cases of goods and makes a legally enforceable tender and delivery of 75 cases to one carrier, he has remaining only 25 cases which can be made the subject of a tender to the second carrier.

2. As a corollary to the rule above discussed, a common carrier by railroad is required upon reasonable request to furnish cars for the transportation of goods over its lines. This duty and obligation is not created by any agreement or promise of the carrier to provide transportation, but arises from the tender of goods by the shipper and his request for cars in which to load them for transportation. To make this obligation effective, the tender must be made of goods set apart and ready for shipment.

Corpus Juris on Carriers, 10 C. J., Sections 66, 67, 70.
Hutchinson on Carriers (3rd Ed.), Sections 495, 511.
Elliott on Railroads, Sections 2219, 2225.
Eastern R. Co. v. Littlefield, 237 U. S., 140, 145.
Ritchie & Gilbert Co. v. Northern Pacific Ry. Co., 125 Northwestern, 897, 899.
Wilder v. St. Johnsburg & L. C. R. Co., 30 Atlantic, 41.

A review of the foregoing authorities makes clear that before a railroad is obligated to furnish cars, or to consider the request of a shipper for cars, an actual or constructive tender of the specific goods to be transported must be made by the

shipper. As, in contemplation of law, the tender of the precise goods to be shipped accompanies and is tied up with the request for cars, it follows that it is impossible for a shipper to make a full and complete tender of the same goods to two different carriers at the same time. The law indulges the fiction that, as an incident of the request for cars, the goods to be transported have been brought to the carrier and offered, *surrendered and delivered* to it for transportation; the same goods could not be offered, surrendered and delivered to two different carriers at the same time. To put it another way, when certain goods are tendered to a carrier accompanied by a request for cars in which to load them, the duty of that carrier arises then and there; that duty could not as a matter of law be acquired by another carrier in respect to the same goods at the same time.

3. The law recognizes, however, that a railroad's car supply may be legally sufficient and yet not sufficient to meet the demands of all shippers in all contingencies. The right of the shipper to cars is not an absolute right, and the carrier is not obligated to furnish sufficient cars to load all the freight offered in times of stress or unusual demand. But when the carrier is unable to furnish sufficient cars to load all the freight tendered and set apart for shipment, the available cars must be divided among the shippers demanding them in some fair and just way, such as the order in which the requests for cars are received, or *pro rata* in accordance with the quantity of goods which the respective shippers tender and set apart ready for immediate shipment.

Corpus Juris on Carriers, 10 C. J., Sections 67, 68, 70.
Hutchinson on Carriers (3d Ed.), Sections 495, 512.
Elliott on Railroads, Section 2217.

Pennsylvania R. Co. v. Puritan Coal Mining Co., 237 U. S., 119, 133-134.
Ayres v. Chicago & N. W. Ry. Co., 37 Northwestern, 432, 436.
State v. Chicago, B. & Q. R. Co., 99 Northwestern, 308, 310.

The inability of the carrier to supply all demands for cars does not relieve the shipper of the precedent requirement to accompany his demand for cars with a *bona fide*, concomitant tender and setting apart of the goods ready for shipment. The shipper must show his good faith in some way. In the last case above cited the court, in determining what part of the defendant's available cars the plaintiff grain shipper was entitled to receive, refused to take into consideration 4,500 bushels of grain on the farm of plaintiff four miles from the shipping station. As *Hutchinson on Carriers*, Section 495, puts it:

> "If owing to an unexpected influx of business, there results a temporary scarcity of such facilities, he (the carrier) will be entitled to apportion the same in an equitable manner, having in mind their relative volume of business, facilities for loading, *and the merchandise in sight*."

As already indicated, a full and complete, *i. e.*, legally enforceable, tender of the same goods cannot, as a matter of law, be made to two different carriers at the same time. The same merchandise cannot be "*in sight*" of two carriers at the same time—that is, sufficiently to give rise to a concurrent duty to furnish cars therefor. The merchandise must be actually or constructively tendered, *delivered and surrendered* to one carrier or the other; the same merchandise

cannot be contemporaneously tendered, delivered, and surrendered to both carriers. It follows that if a shipper has only sufficient goods ready for shipment to load 100 cars, he cannot possibly make a legal tender of sufficient goods to load 150 cars or 200 cars, even though the request for cars is divided between two carriers.

4. So it is with coal. While coal cannot ordinarily be made ready for shipment until the cars are received, the same rules of law as to tender nevertheless apply. Indeed, it has been held in Illinois that a carrier is not obligated to furnish cars for coal not yet mined and ready for shipment.

Illinois, etc., R. Co. v. People, 19 Ill. Appeals, 141; affirmed, 14 Northeastern, 261.

The maximum tonnage which a mine can legally tender for transportation in a single day is measured by the maximum amount which it can mine, load and forward in a single day. If a mine can produce only 100 carloads of coal per day, it cannot make a fully qualified tender to the carrier or carriers serving it of more than 100 carloads of coal per day. Nor can it, as a matter of law, make a fully qualified or legally enforceable tender of the same coal or physical capacity to produce and load the same coal to two different carriers on the same day, as the law will not presume that two carriers can acquire a contemporaneous obligation to furnish cars for the same lot of coal. If a mine with a physical capacity to produce 100 carloads of coal per day tenders and sets apart 75 car loads to one carrier, the obligation of that carrier with respect to that coal attaches immediately; the maximum amount which the same mine can tender and set apart on the same day to a second carrier in a way which

will call into play the common-law duty and obligation of that carrier is 25 carloads, as 100 carloads is all the coal the mine has capacity to produce and tender in one day.

5. The rule in issue here limits the orders for cars by a joint mine to 100 per cent of its gross daily rating or capacity to produce and load coal. It is designed merely to enforce a truth, and that is that a mine cannot possibly make a fully qualified and legally enforceable tender of more coal on a given day than it can produce and make ready for shipment on that day. The gross daily rating of a joint mine is the measure of its maximum capacity to tender for shipment, and a provision which polices and enforces the common-law rule that the available cars of a carrier shall be distributed *pro rata* among the mines in accordance with their respective duly qualified tenders for shipment is in no sense a limitation on or curtailment of the common-law obligations of the carrier or carriers.

Any contention that the capacity of a joint mine to tender for shipment is by some legerdemain increased when the tender is made to two carriers is a legal absurdity. If a joint mine with a gross daily rating of 100 cars per day orders 75 cars from each of two carriers for loading on a certain day, it is conclusive evidence that the mine has not made a full, complete, and legally enforceable tender of the coal tied up with one or both of the orders for cars. If a duly qualified and enforceable tender of sufficient coal or capacity to load 75 cars has been made to one of two carriers, it is simply beyond the capacity of that joint mine to make a further tender of more than 25 carloads to the second carrier. The maximum capacity of the mine to make fully qualified tenders—tenders sufficient in law to give rise to the concurrent

obligations of the one, two or more carriers—is measured exactly by its maximum capacity to produce and make ready for shipment, *i. e.*, by its gross daily rating.

6. This court has held that, "in case of car shortage occasioned by unexpected demands, they (the carriers) are bound to treat shippers fairly, if not identically." *Pennsylvania R. Co. v. Puritan Coal Min. Co., supra.* The highest court of the State of Wisconsin has held that, during such periods, "the rights of all shippers applying for cars under the same circumstances are necessarily equal." *Ayres v. Chicago & N. W. Ry. Co., supra.*

Rule 1, reading, "The daily rating or the daily order for cars if less than the rating shall be the basis for car distribution," in effect requires a local mine to comply with the common-law rule to make a fully qualified tender of capacity to load and ship the number of cars ordered, *i. e.*, to accompany its order with a contemporaneous tender of capacity to load and ship the number of cars ordered. By providing that "the raily rating *or the daily order if less than the rating* shall be the basis for car distribution," the rule in effect provides that orders for cars *in excess of the rating* will not be recognized or considered for the reason that, to the extent of the excess, such orders are not backed up with *bona fide,* concomitant tenders and therefore give rise to no duty or obligation of the carrier.

The 100 per cent rule has the effect of compelling a joint mine, when ordering cars from two or more carriers, to make the same fully qualified tender of its coal as is required of a local mine. It is at once a rule and a police regulation to enforce the rule; it is merely a convenient means of requiring

joint mines, like other rules require local mines, to comply with the common-law rule to accompany all orders for cars with contemporaneous tenders of capacity to load and ship the number of cars ordered on the particular day for which they are ordered. It is not a limitation on the legally enforceable common-law obligations of the carriers; it is a definition based upon truth and law of the extent of those obligations when a joint mine orders cars from two or more carriers in times of car shortage.

7. In a brief submitted to the court below, counsel for complainants, appellees here, gave numerous illustrations of the operation of the rule followed by contentions predicated thereon. We take the liberty of quoting the following:

> "When carrier 'A' is offered 200 cars of coal and accepts for shipment only 160 cars on account of short car supply, he rejects 40 cars. There is then no obligation on the shipper to hold these 40 cars of coal for 'A' and no right or obligation whatever as between the shipper and 'A' with reference to them. The contract of carriage is concluded between the shipper and 'A' and applies only to the 160 cars of coal which 'A' has accepted and that is all that the shipper is required to hold for 'A.'
>
> * * * * * * *
>
> "The illustrations heretofore given make it clear that when the order is accepted on Monday for cars that constitutes a contract for the carriage of such coal as may be loaded in the number of cars agreed to be furnished. * * * The balance of the shipper's offer of such coal is rejected by carrier 'A' on Monday afternoon and is, therefore, available at that time for offer for Tuesday's loading to carrier 'B.'"

The foregoing illustration is misleading and fallacious. It is based upon the impossible assumption that the mine and carriers know before 4 p. m. on Monday what will transpire after 4 p. m. of that day and on the following day. Note this statement of the illustration: When a joint mine with a gross daily rating of 200 cars tenders its entire output to carrier "A" on Monday for loading on Tuesday, and that carrier has only an 80 per cent supply available on Tuesday, the mine has 40 cars which it can tender to carrier 'B' on Monday for loading on Tuesday.

Rules not attacked in the bill provide that all orders for cars shall be on file with the car distributor at 4 p. m. of the day before the cars are desired for loading; orders for cars desired for loading on Tuesday must be filed on Monday. Before 4 p. m. on Monday the carrier does not know how many cars the mines will desire for loading on Tuesday, nor does it know how many cars it will have available for loading on Tuesday. *And these two facts must be known before the pro rata share of any mine or the percentage supply of all mines can be determined.* There is therefore no foundation for the contention that the carrier contracts on Monday to furnish a definite number of cars for loading on Tuesday, or that it rejects on Monday any coal tendered for loading on Tuesday.

Assume that the aggregate rating of all mines served by a certain carrier is 1,000 cars per day, divided equally between joint mines and local mines. That carrier has no means of knowing, before 4 p. m. on Monday, how many cars those mines will require for Tuesday's loading. The joint mines may order their aggregate rating of 500 cars from the other carrier, or they may split their orders between the two car-

riers in different ways as they have the right to do under the rule. Or some of the mines, on account of local labor strikes, breakdown of machinery, or other temporary disability may order no cars whatsoever, or perhaps less than their respective ratings. It will be remembered that the rules provide that the available cars shall be distributed *pro rata* among the mines in accordance with their daily ratings *or their daily orders for cars if less than their ratings.* Obviously, the *pro rata* share of the available cars to which any given mine will be entitled on Tuesday cannot be determined until *after* 4 p. m. on Monday when the orders of all the mines have been received and tabulated.

Furthermore, the carrier does not know even as late as 4 p. m. how many cars it will have available for loading on the following day. The empty cars which will be available for loading on a given day are received continuously during the previous day and night, so that the aggregate supply of cars is not definitely known until the early morning of the day the cars are to be distributed (Record, 133). And, until the carrier knows how many cars it will have available for loading on a given day, it has no way of determining the percentage supply which it will be able to furnish.

To return to the illustration—if a joint mine with a gross daily rating of 200 cars tenders its entire output to carrier "A" on Monday for loading on Tuesday, that tender must remain in the possession and under the undivided control of carrier "A" until after 4 p. m. on Monday in order to entitle the mine to a *pro rata* share of the available cars on that basis. If the orders of all the mines aggregate 1,000 cars for loading on Tuesday, the joint mine will be entitled

to 20 per cent of all the cars available on Tuesday, as its tender of 200 carloads is 20 per cent of the total tenders of 1,000 carloads. If the aggregate tenders turn out to be only 600 carloads it will be entitled to 33⅓ per cent of the available cars. The cars for loading on Tuesday will be ready for distribution Monday night or early Tuesday morning. Regardless of their number, the joint mine above referred to will be entitled to a *pro rata* share thereof based on the percentage which its order or tender of 200 cars on file at 4 p. m. on Monday bears to the total orders or tenders on file at 4 p. m. on Monday. *But if any part of its tender of 200 carloads is withdrawn before 4 p. m. on Monday, the basis of its pro rata share of the cars available on carrier "A" on Tuesday is automatically and correspondingly reduced.* On the other hand, if its tender of 200 carloads remains in the possession and control of carrier "A" until after 4 p. m., it cannot make any tender to carrier "B" on that day, as its maximum capacity to tender is represented by its gross daily rating of 200 cars.

8. Let us assume for the moment that, when a joint mine with a gross daily rating of 200 cars tenders its entire output on Monday to carrier "A" for loading on Tuesday and that carrier has an 80 per cent supply available on Tuesday, the contract thus completed on Tuesday relates back to some time before 4 p. m. on Monday in such a way that the mine still has available for tender on Monday 40 carloads of coal. Now if this 40 carloads of coal is free and subject to be tendered, why can't the joint mine again offer it to carrier "A"? And, after the mine has acquired "credit" for an additional 32 cars (80 per cent of 40), what is to prevent it from again offering the remaining 8 cars to carrier "A," and

so on *ad infinitum?* If the difference between the tender to the carrier on Monday and the cars the mine will receive on Tuesday is by some legerdemain still under the control of the mine and the subject of retender on Monday, it may be again offered to the same carrier quite as logically as it may be offered to the second carrier. This imaginary remainder is free coal or it is not; if it is free coal, it may be offered to any carrier because such is the "legal right" of the mine.

Now if the joint mine has a "legal right" to consider rejected on Monday so much of its tender as is actually rejected on Tuesday, a local mine most certainly has a similar "legal right" and entitled to go through a similar process of offering and reoffering its "rejected" coal. For, to use the words of this court in *Pennsylvania R. Co. v. Puritan Coal Mining Co., supra,* "in case of car shortage occasioned by unexpected demands, they (the carriers) are bound to treat shippers fairly, if not identically," and the words of the Supreme Court of Wisconsin in the *Ayres case, supra,* "the rights of all shippers applying for cars under the same circumstances are necessarily equal."

The fact is that the tender of 200 carloads of coal made by the joint mine before 4 p. m. on Monday to carrier "A" remains in the possession and control of that carrier until after 4 p. m. on Monday, *else the mine would not be entitled to a pro rata share of the cars available on Tuesday on the basis of such a tender.* And after 4 p. m. on Monday, it is too late for the mine to make any tender to carrier "B." If, notwithstanding the *bona fide* tender of its entire gross daily rating to carrier "A," the mine is given the "legal right" to make a fictitious tender of say 40 carloads of coal to carrier "B," it certainly could not be said that the fictitious tender

of 40 carloads by the joint mine is presented "under the same circumstances" as a *bona fide* tender of 40 carloads by a local mine. If the two tenders are not presented under similar circumstances, the rights of the two mines are not "necessarily equal." It would not be treating shippers "fairly" or "identically" if a joint mine were allotted the same *pro rata* share on a fictitious tender of 40 carloads of coal as was a local mine on a *bona fide,* legally enforceable tender of 40 carloads.

To illustrate further, suppose a manufacturer of shoes in St. Louis has 100 cases of shoes for shipment to Chicago over one or more of the numerous carriers serving those cities. It is the practice of carriers to keep open their freight-receiving stations each week day until a specified hour in the afternoon, say 4 o'clock, and to accept for shipment each day all freight offered, surrendered and delivered over the platforms of their stations up to and at that hour. Now assume that the carriers serving St. Louis have established a rule that, in times of heavy traffic, the available car space in their outbound freight trains to Chicago will be divided *pro rata* among the shippers in accordance with the quantity of goods which they (the shippers) have delivered to the carriers on the platforms of their freight-receiving stations *up to and at 4 p. m.* May the shipper with the 100 cases of shoes take the entire 100 cases to one carrier on a day when there is likely to be a shortage of car space in outbound trains and, while actually delivering and surrendering possession of only 75 cases to that carrier, get "credit" in some way for delivering and surrendering 100 cases so as to be entitled to a *pro rata* share of the available car space on the basis of 100 cases? Has that shipper a "legal right" to a *pro rata* share of

the available transportation on the basis of 100 cases of goods, when he has delivered and surrendered to the carrier only 75 cases? Has he a "legal right" to the same *pro rata* share of the available car space as a competing shipper who has actually delivered and completely surrendered to the same carrier on the same day 100 cases of goods? Has the first shipper a "legal right" to the same *pro rata* share of the available car space on the basis of his bogus tender of 25 cases, as a competing shipper who has made a *bona fide* tender and delivery of 25 cases? Are the bogus tender of 25 cases by the first shipper and the *bona fide* tender and delivery of 25 cases by the competing shipper presented under the same circumstances? Would it be treating shippers "fairly" or "identically" if the same consideration were given to such fictitious tenders as was given to *bona fide* tenders? Common-law principles of justice and fairness require that all these questions be answered in the negative.

Again, suppose the freight-receiving station and all its contents were totally destroyed by fire just before the station was to close for the day, would the crafty shipper above referred to who had actually delivered and surrendered to the carrier only 75 cases of goods be entitled to recover damages for the value of 100 cases? Assume that that shipper, with only 100 cases of shoes to ship, makes "tenders" of 75 cases to each of two carriers on the same day in such a way that he claims *pro rata* shares of the available car space on such bases and that the freight-receiving stations of both carriers are destroyed, will those carriers each be liable for the loss of 75 cases? Of course not. A carrier is not liable for goods which are not completely surrendered into its possession and under its undivided control; *a fortiori*, it

acquires no duty to transport unless and until the goods are actually or constructively delivered to it for transportation. And it acquires no duty to furnish cars to a joint coal mine, or to set aside any part of its available supply of cars to a joint mine, or to "credit" a joint mine with a "tender" as a basis for a *pro rata* share of the available cars, unless and until that mine shows its good faith by setting apart sufficient coal or sufficient capacity to load the number of cars ordered.

9. At common law an order for cars must be accompanied by an actual or constructive tender of the property to be shipped before any duty or obligation of the carrier will attach. The tender must remain in the possession and under the undivided control of the carrier. The 100 per cent rule compels joint mines, as other rules compel local mines, to comply with this requirement of the common law. It is merely one integral part of a body of rules whose application and operation are necessary to insure equality of treatment to all mines in times of car shortage, *including joint mines which do not split their tenders between the carriers serving them.* The 100 per cent rule is not in contravention of the comomn law; it is in fact required by the common-law rule of tender and the common-law rule of identity of treatment under similar circumstances.

THE 100 PER CENT RULE IS REQUIRED BY EXPRESS PROVISIONS OF THE INTERSTATE COMMERCE ACT WITH WHICH THE CARRIERS ARE BOUND TO COMPLY WITHOUT ANY ADMINISTRATIVE ACTION BY THE COMMISSION.

The particular provisions here relied upon are paragraphs 2 and 4 of Section One, and paragraph 12 of the same section.

The Significance of Paragraphs 3 and 4.

1. These paragraphs, in so far as they are pertinent here, are as follows:

> Paragraph 3: The term "transportation," as used in this Act, shall include * * * cars * * * and all instrumentalities and facilities of shipment or carriage * * *.
>
> Paragraph 4: It shall be the duty of every common carrier subject to the Act, engaged in the transportation of passengers or property, to provide and furnish such transportation *upon reasonable request therefor.* (Italics mine.)

While there was a definition of the term "transportation" in the original act, it was made more specific by the amendment of June 29, 1906. Paragraph 4 of Section 1 was not in the original act; it was also added by the amendment of June 29, 1906. These provisions have been declared by the Commission and also by this Court to be merely a "statement of common-law obligations which already existed."

> *Annual Report of Commission for Year 1906,* page 17.
>
> *Pennsylvania R. R. v. Sonman Coal Co.,* 242 U. S., 120, 125.

2. At common law, a naked request for transportation is not entitled to any consideration by the carrier; it does not initiate any obligation on the part of the carrier. To give rise to the obligation of the carrier, the request must be accompanied by a tender, an actual or constructive bringing, delivering, and surrendering to the carrier, of the specific

goods to be transported. If the goods are not physically brought to the carrier and offered to it for transportation, they must be set apart and otherwise identified with the request for cars.

A statute in affirmance of the common law is construed and interpreted in accordance with the common law.

Sutherland on Statutory Construction (2d Ed.), Sections 329-330, 454-456.

Statutes and Statutory Construction, Fed. Stat. Ann. (2d Ed.), vol. 1, p. 121.

Cumberland Telephone & Telegraph Co. v. Kelly, 160 Fed., 316, 321 (by Circuit Judge Lurton, afterward Justice Lurton).

Kepner v. United States, 195 U. S., 100.

It follows that when the Congress incorporated into the act provisions declaratory of the common law, it also adopted the common-law construction thereof. Therefore, when the Congress incorporated into the act a provision that it shall be the duty of common carriers to provide and furnish transportation (including cars) *upon reasonable request therefor,* it also adopted the common-law rule that a request for transportation must be accompanied by a *bona fide* tender of the property to be transported—by an actual or constructive bringing, delivering and surrendering to the carrier of the specific goods to be shipped, in such a way that the goods may be identified with the request for transportation.

3. Accordingly, if a joint mine has a gross daily rating or shipping capacity of 100 cars, it cannot possibly make full, complete and legally enforceable tenders of more than 100 carloads of coal per day; it cannot make reasonable requests for more than 100 cars per day. That mine cannot

make full, complete and legally enforceable tenders of more than 100 carloads of coal per day, even though its requests are addressed and its tenders offered to more than one carrier during a period of car shortage. If that mine tenders its entire capacity to one carrier on a given day for loading on the following day, it has no capacity remaining to make the subject of a tender to a second carrier on the same day; if it tenders 75 carloads of coal to one carrier, it cannot tender more than 25 carloads to the second carrier, as its capacity to make fully qualified tenders is 100 carloads of coal per day and no more.

The Requirements of Paragraph 12.

1. While no reliance is placed here upon paragraph 11 of Section 1, it is quoted below along with paragraph 12, in order to show by contrast the exceptional character of the mandatory requirement contained in the second sentence of paragraph 12.

> Paragraph 11: It shall be the duty of every carrier by railroad subject to this Act to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulations, and practice with respect to car service is prohibited and declared to be unlawful.
>
> Paragraph 12: It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car

> supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States.

It will be noted that paragraph 11 is a statement of general duties, and the first sentence of paragraph 12 a statement of a special duty, imposed upon every carrier. Paragraph 11 imposes upon every carrier the general duties (*a*) to furnish safe and adequate car service and (*b*) to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service, while the first sentence of paragraph 12 imposes the special duty (*c*) to make just and reasonable distribution of cars for transportation of coal among the mines served by it and its dependent connections.

On the other hand, the second sentence of paragraph 12 is in the nature of a proviso to the first sentence. It is not a statement of a general duty; *it is a definition of the* PRECISE *way in which a* SPECIAL *duty* MUST *be performed during* CERTAIN *periods.* Where a statute directs the performance of a certain duty in a particular manner, it forbids by

implication every other manner of performance. *Expressio unius est exclusio alterius.*

Southerland on Statutory Construction (2d Ed.), Sections 491-493.
Corpus Juris, vol. 25, page 220.

While the law requires every carrier, *during periods of car surplus,* to make just and reasonable distribution of cars among the mines and leaves the question of what is just and reasonable distribution of cars to the discretion of the carrier in the first instance and of the Commission on complaint; *during periods of car shortage,* the second sentence of paragraph 12 of Section 1 specifies the particular manner in which the cars are to be distributed and leaves nothing regarding distribution to the discretion of either the carrier or the Commission. And to the prescription of the particular manner in which that duty must be performed, the Congress attached a specific and severe penalty. The Congress made failure or refusal "so to do" unlawful and imposed a forfeiture of $100 for each offense.

There may be room for the exercise of discretion by the carrier and the Commission in fixing the mine ratings applicable during periods of car shortage, but the bills makes no attack upon the justness or reasonableness of mine ratings or of the rules which determine them.

2. The first significant fact to be noticed is that the law goes further than to require the carrier to MAINTAIN just and reasonable ratings, *i. e.,* to keep such ratings in existence. It also requires the carrier to APPLY such ratings. To APPLY is to put into practical operation. *Century Dictionary,* 2.

What is a rating? A rating is the measure of the maximum capacity of a local mine to tender coal for shipment to the single carrier serving it. What is a gross rating? It is the measure of the maximum capacity of a joint mine to tender coal for shipment to the two or more carriers serving it. It follows necessarily and inevitably that, to put into practical operation the gross daily rating of a joint mine, it is incumbent upon a given carrier to make sure that the tender of such a mine is genuine and not fictitious—that the mine's request for cars is accompanied by a concomitant tender and setting aside of sufficient capacity to load the number of cars ordered on the particular day for which they are ordered. To do this, it is necessary for each carrier serving a joint mine to police the tenders and orders of the mine, and to take into consideration tenders to the other carriers serving the mine. If a joint mine has a rating or capacity to tender 100 carloads of coal per day, it would most certainly not be putting that rating into practical operation if one of the two carriers serving the mine would take into consideration and accept from that mine (after the mine had made a *bona fide* tender of 75 carloads of coal to the other carrier) a tender of more than 25 carloads of coal. *The mandate of the statute is to apply the rating of the mine, not an artificial inflation of the rating.* To put a joint-mine rating into practical as opposed to theoretical or speculative operation, the carrier cannot consider, as a basis for determining the mine's *pro rata* share of the available cars, any artificial or fictitious tenders of that mine.

The second significant fact to be noticed about the language of the law is that, while the first two mentioned duties of every carrier to MAINTAIN and APPLY just and reasonable

ratings of the mines are limited to the mines served by it and its dependent connections, the third mentioned duty to COUNT each and every car furnished is not limited to each and every car furnished by it and its dependent connections. The duty of every carrier to COUNT each and every car applies to each and every car furnished to or USED BY the mine, not alone to each and every car furnished to the mine by that particular carrier and its dependent connections, but also to each and every car furnished to the mine by any other carrier or carriers, if the mine is served by two or more carriers. If every carrier serving a joint mine puts into practical as opposed to theoretical or speculative operation the gross daily rating of such mine to make *bona fide,* legally enforceable tenders of coal for transportation, and counts each and every car *used by* the mine, it will be compelled to reject and not consider any tender made by the mine in excess of the difference between its gross daily rating and the amount of its *bona fide* tender on the same day to the other carrier; it will be compelled to consult the other carrier for the purpose of ascertaining how much of the mine's capacity has been set aside for account of such other carrier on the same day.

The number of cars furnished to or USED BY a joint mine on a given day of car shortage represents its *pro rata* share of the available cars based upon its rating or its order or orders if less than its rating. By requiring each carrier to count all cars furnished by all carriers to a joint mine on a given day, the law necessarily requires each carrier to count and consider all cars ordered by that mine from all carriers on that day. In no other way can the GROSS daily rating of the mine be put into PRACTICAL operation.

3. In this connection, it may be noted that a reasonable request for transportation by a mine is a condition precedent to the duty of the carrier to apply the rating of that mine. If on a certain day a given mine makes no request for cars, obviously the duty of the carrier to apply its rating on that day is not called into play. The carrier may be *maintaining* a rating of 100 cars per day for that mine because during the preceding month the mine demonstrated its capacity to load 100 cars per day, but on a certain day, because of labor trouble or a temporary breakdown of its machinery, it may not order any cars, *i. e.*, it may not make any request for transportation. If no demand for cars is made, no cars are furnished, and if no cars are furnished, there are no cars to count against the mine. It is therefore seen that an order for cars by a mine backed up with a concomitant tender of capacity to load and ship the number of cars ordered is the signal calling forth the duty of the carrier to apply and put into practical operation the rating of the mine.

It follows that, if a joint mine with a GROSS daily rating of 100 cars makes a *bona fide* tender of enough of its capacity to load 75 cars to one carrier on a given day, the just and reasonable rating of the mine on that day so far as that carrier is concerned is 75 cars. The mine now has sufficient capacity remaining to load 25 additional cars; if it orders cars from the second carrier on the same day, its maximum rating on that carrier is necessarily 25 cars, as its gross rating on both carriers is only 100 cars.

In this connection, the Circuit Court for the Northern District of Illinois said in *Chicago & A. R. Co. v. Interstate Commerce Commission*, 173 Fed., 930, 933:

> "The mine operators are objects of interest under the interstate common law, not as diggers of coal, but

as shippers who tender a commercial product for transportation by interstate common carriers. The basis, therefore, on which the mines in a district should be rated, is not their average output as a physical question, but the average output which they respectively tender for transporation in commerce. If two mines have capacities of producing 1,000 tons each per day, they should have the same rating if they are each offering the whole amount for transportation in commerce. But if one of these mines, by reason of exhaustion of a vein, or flooding of a shaft, or the operator's local consumption of his own fuel, can and does offer for transportation in commerce only 500 tons per day, equity requires that the carrier should rate it at only one-half of the other mine." (See note.)

4. That the law in effect requires the operation of the 100 per cent rule is further demonstrated by the impossibility of reconciling the law with the 150 per cent rule, or any other rule which would permit a joint mine arbitrarily to inflate its rating when it orders cars from two or more carriers on the same day.

The gross rating of a joint mine is obtained by dividing the total tonnage shipped by it during the preceding month

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NOTE.—This was the decision of the Circuit Court on the application of the railroads to enjoin the Commission's order in the *Trer Case*, 13 I. C. C., 451. The court refused to enjoin the order in so far as it applied to system cars, private cars, and foreign fuel cars, but did enjoin it in so far as it applied to company fuel cars on the theory that company fuel is not transported in commerce. Upon appeal, the Supreme Court decided that company fuel is transported in commerce, and reversed the court below on that point only. 215 U. S., 451. There is nothing in the decision of the Supreme Court which is inconsistent with the above-quoted views of the Circuit Court.

via all the carriers serving it by the number of hours worked in producing that tonnage, and multiplying the quotient by the number of hours (eight in the New River District of West Virginia) in the recognized work day. The result of this computation is the *gross* daily rating of the mine; it represents its aggregate productive and shipping capacity—its maximum coal-tendering capacity. So far as this case is concerned this result is the *just and reasonable* gross rating of the mine, as no attack is made in the bill of complaint against the gross ratings of the complainant mines or the foregoing rule for determining gross ratings. Now if the just and reasonable rating of a joint mine, according to the foregoing rule, is 100 carloads of coal per day, any rule or regulation which would give it an artificial rating of 150 carloads per day during periods of car shortage would be NECESSARILY unjust and unreasonable. And the artificially inflated rating would be NECESSARILY unjust and unreasonable. *For the just and reasonable rating of a mine is based upon its physical capacity to produce and tender coal for shipment, and not upon the number of carriers to which it may offer its coal for transportation.*

Under the 150 per cent rule, the rating of a joint mine is its actual shipping capacity when it tenders its coal to a single carrier, but 150 per cent of its actual shipping capacity when it tenders its coal to two or more carriers. In other words, under that rule, the rating of a joint mine is its just and reasonable rating when it tenders coal to a single carrier, but its just and reasonable rating artificially inflated 50 per cent when it tenders coal to two or more carriers. The positive mandate of the statute is to apply the just and reasonable rating of the mine, not an artificially inflated rating. *The*

statute makes no distinction between joint mines which tender their coal to a single carrier and those which tender their coal to two or more carriers.

Whenever the available car supply of the carriers serving a joint mine averages 67 per cent or better, the operation of the 150 per cent rule permitting such a mine arbitrarily to inflate its gross rating for the purpose of ordering cars to 150 per cent of its actual rating results in its receiving more than its loading capacity of cars. This is so because 67 per cent of 150 per cent is more than 100 per cent. For example, a joint mine with a rated loading capacity of 100 cars per day would be entitled to receive 120 cars on a day when it ordered 75 cars from each of two carriers having an 80 per cent supply available. As the demonstrated loading capacity of the mine is only 100 cars per day, both the inflated rating and the rule which permitted it are necessarily unjust and unreasonable. In an attempt to meet this situation, the Commission declared in its first decision in the case which culminated in this litigation that actual deliveries of cars to a joint mine should be limited to its actual rating or loading capacity (Record, 30). But what becomes of the positive and unqualified mandate of the statute that during periods of car shortage ratings shall be APPLIED? If a joint mine is given a rating of 75 cars on each of two carriers, or a gross rating of 150 cars on both carriers as a result of the 150 per cent rule, the statute then steps in and says that such ratings must be APPLIED. The simple plain truth is that such fictitious and artificial ratings cannot be applied in the manner required by the statute, and hence the ratings as well as the arbitrary rule which created them are unjust and unreasonable on their face.

It was also contended before the Commission that the intent and purpose of the Congress in requiring every carrier to maintain and apply just and reasonable ratings and to count each and every car furnished to or used by a mine against the mine was merely to abolish the practice of arbitrarily assigning cars to particular mines and not counting such cars against the distributive shares of such mines. The language of the law has the effect of prohibiting the practice of arbitrarily assigning to some mines a greater *pro rata* share of the available cars than to other mines on the same carrier, but there is nothing in the law to indicate that that was the only intent and purpose of the Congress. It is a cardinal rule of statutory construction that the legislative intent must be ascertained primarily from the language which the legislature has used and, if the language used is clear and free from doubt, it must be taken as the final expression of the legislative intent. It is also fundamental that the Congress is not to be presumed to have used superfluous words; if possible, some meaning must be given to every word in a statute.

Platt v. Union Pacific R. R. Co., 99 U. S., 48, 58-59.
Sturges v. Crowinshield, 4 Wheaton, 122, 202-203.
United States v. Goldenberg, 168 U. S., 95, 102-103.
Hamilton v. Rathbone, 175 U. S., 414, 419.
Caminetti v. United States, 242 U. S., 470, 485, 490.

In the *Caminetti case, supra*, the court held that—

> "When words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names

> or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent."

The language of the second sentence of paragraph 12 of Section 1 of the act making it the duty of every carrier, during periods of car shortage, to maintain and APPLY just and reasonable ratings of the mines served by it is clear and plain and requires a *pro rata* distribution of the available cars on the basis of ratings and, when read in connection with paragraph 4 of Section 1, making it the duty of every carrier to furnish cars *upon reasonable request therefor*, it requires a *pro rata* distribution on the basis of ratings or reasonable requests (requests backed up with concomitant capacity to load the number of cars requested) if such requests are less than the ratings. The very idea of a distribution on the basis of fictitious or artificially inflated ratings is abhorrent to the spirit and letter of the law. So, too, the language of the law making it the duty of every carrier to count each and every car furnished to or USED BY the mine against the mine is clear and plain and means exactly what it says, to wit, to count each and every car USED BY the mine whether furnished by one or more carriers.

It follows from what has been said that the District Court erred in annulling the 100 per cent rule.

II.

If the Hundred Per Cent Rule is Not Required by Express Provisions of the Interstate Commerce Act, it is Certainly Within the Administrative Functions and Power of the Commission to Prescribe or Approve.

1. The 100 per cent rule was one among many rules and regulations governing the distribution of coal cars during periods of car shortage. Indeed, it was merely part of one rule. This part of a rule limited the daily orders of a joint mine, on the basis of which its *pro rata* shares of the available cars of the carriers addressed would be determined, to 100 per cent of its daily capacity to load. The complaints filed with the Commission charged that this rule was (*a*) unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act, and (*b*) unduly prejudicial to the complainant joint-mine operators and unduly preferential to the local-mine operators in violation of Section 3 of the act. No attack was made upon the rules for determining the capacity of a mine to load cars, nor upon the rule that available cars shall be distributed pro rata among the various mines in accordance with their respective capacities to load cars or their daily orders for cars if for numbers less than their respective capacities to load.

By the prayer of the complaint, the Commission was asked to strike down the 100 per cent rule and to establish in lieu thereof "such other rules, regulations and practices as the Commission may deem reasonable and just." Thus, the complaint called upon the Commission to exercise its

administrative discretion in respect to a rule of car distribution, and to prescribe a rule which in its judgment would be within the zone of reasonableness and fairness.

2. A discussion of the allegations of the complaint in the light of the particular sections of the act alleged to have been violated by the 100 per cent rule will demonstrate conclusively that the questions presented were purely administrative in character and therefore within the jurisdiction of the Commission to determine.

(*a*) As stated at the outset, the basic contention of the joint-mine operators is that a joint mine may tender more than 100 per cent of its shipping and loading capacity to the two or more carriers serving it and receive *pro rata* shares of the available cars on the basis of such tenders. In other words, the contention is that a joint mine with a loading and shipping capacity of 100 cars per day may make requests for 150 or 200 cars per day and receive *pro rata* shares of the available cars on the basis of such requests.

Turning to the first of the particular sections of the Act alleged to be transgressed by the 100 per cent rule, which limits the daily requests of a joint mine to 100 per cent of its gross daily rating, it is found that section 1, paragraph 4, does not require carriers to furnish cars upon any and all requests. It requires carriers to furnish cars upon *reasonable* request, and reasonable request *only*. What is a reasonable request? The answer to this question is of controlling importance during periods of car shortage as, during such periods, the available cars are divided pro rata among the shippers demanding them in accordance with their *reasonable* requests.

We have taken the position up to this point that, when Congress incorporated into the act the provision making it the duty of carriers to furnish cars *upon reasonable request,* it also adopted the common-law rule that to call into play this duty of a carrier the shipper must accompany his request for cars with a *bona fide,* concomitant tender and delivery, actual or constructive, of sufficient goods ready for immediate shipment to load the number of cars ordered. If this does not follow, who is to determine what is a reasonable request? Who is to determine whether orders for cars given under a particular set of circumstances are reasonable or unreasonable?

It cannot be doubted that, by adopting the provisions referred to, Congress assumed paramount and exclusive authority over the subject of the furnishing of cars by carriers for the transportation of goods in interstate commerce. This was squarely held in *Chicago, R. I. & P. R. Co. v. Hardwick Farmers Elevator Co.,* 226 U. S., 426, where this court declared invalid a statute of Minnesota requiring carriers to furnish cars within a certain number of days with penalties for each day's delay beyond the specified number, on the ground that Congress, by the adoption of paragraph 4 of section 1 of the Interstate Commerce Act, occupied the whole field of regulation in respect to the subject matter of that legislation. But the provision referred to, making it the duty of carriers to furnish cars upon reasonable request, does not define what is a reasonable request or prescribe a formula for determining what is a reasonable request. However, that provision was made part of the Interstate Commerce Act. By paragraph 1 of section 12 of that act the duty is laid upon the Commission to execute and enforce the provisions of the act, and by

section 15 the Commission is authorized and empowered to prescribe new regulations and practices in lieu of those found to be unjust, unreasonable or unduly prejudicial. It therefore follows that Congress has confided to the Commission the administrative authority to determine what is a reasonable request, just as it has confided to the Commission the administrative power and authority to determine what is a reasonable rate.

Invoking this administrative authority of the Commission, the joint-mine operators represented that two requests by a joint mine with a gross daily rating of 100 cars for an aggregate of 150 or 200 cars for loading on a given day are reasonable requests. The local-mine operators contended that such requests are unreasonable to the extent that they exceed the gross daily rating of the mine and that each of the two requests is unreasonable to the extent that, added to the other, the aggregate is in excess of the gross daily rating of the mine. Acting under and by virtue of its administrative authority, the Commission found that the 100 per cent rule, which limits the daily requests of a joint mine to an aggregate of 100 per cent of its gross daily rating, was not in principle unjust or unreasonable, and thereby adopted the common law rule that to be reasonable a request for cars must be accompanied by an actual or constructive tender of sufficient goods ready for immediate shipment to load the number of cars ordered. In other words, the Commission held that as the gross daily rating of a joint mine represents its maximum daily capacity to make ready for shipment and load coal, it is not unreasonable to limit its daily requests for cars to its gross daily rating.

(*b*) The next provisions of the law alleged to have been violated by the 100 per cent rule are paragraphs 11 and 12 of section 1. Paragraph 11 requires every carrier by railroad "to furnish safe and adequate car service and to establish, observe and enforce just and reasonable rules, regulations, and practices with respect to car service." The language of this paragraph in respect to car service follows closely that of paragraph 5 in respect to rates, consequently, so far as paragraph 11 is concerned, there is just as wide a field for the judgment of the Commission in respect to car service as there is in respect to rates.

The same thing is true of the first sentence of paragraph 12, requiring every carrier to make a just and reasonable distribution of coal cars among coal mines. And if, as we have hereinbefore contended, the second sentence of paragraph 12 of section 1 does not in effect require the maintenance and application of the 100 per cent rule, there is plenty of room for the exercise of judgment by the Commission in the administration of that part of the law. This is especially so when that part of paragraph 12 of section 1 is considered in connection with paragraph 4 of the same section.

The second sentence of paragraph 12, which applies only during periods of car shortage, requires every carrier to maintain and apply just and reasonable ratings and to count each and every car furnished to or used by a mine against the mine. Suppose a mine has a just and reasonable rating or loading capacity of 100 cars per day but on a given day, because of a local strike or a break-down of machinery, it makes no request for cars; is it the duty of the carrier to apply the rating of the mine on that day? Of course not.

The duty to apply the rating, like many other duties of the carrier, is one which arises only upon reasonable request. And, as the law does not define what is a reasonable request, it is for the Commission to determine the qualifications of a reasonable request and therefore to prescribe the circumstances and conditions under which the duty of the carrier to apply the rating of a mine may be called into play from day to day. By holding that the 100 per cent rule is not in principle unjust or unreasonable within the meaning of section 1, the Commission in effect held that as the gross daily rating of a joint mine represents its maximum capacity to produce and tender coal for shipment, it also represents its maximum capacity to make reasonable requests for cars, and hence its maximum capacity to call forth the duty of the carrier or carriers serving it under paragraph 12 of section 1.

Furthermore, while this paragraph of the law requires carriers, during periods of car shortage, to maintain and apply just and reasonable ratings of coal mines, it prescribes no formula for determining what are just and reasonable ratings. This is another matter left to the discretion and administrative judgment of the Commission. The just and reasonable rating of a mine, considered as one of the factors used in arriving at the *pro rata* share of the available cars of the mine from day to day is not necessarily the same as the capacity of the mine to load cars. The just and reasonable rating of a local mine from day to day is represented by its capacity to load cars *or by its request for cars if for a number less than its capacity to load.* The just and reasonable rating of a joint mine, when ordering cars from only one of the carriers serving it, is represented by its capacity to load cars *or by its order for cars if for a number less than its*

capacity to load. The 100 per cent rule only applies to a joint mine when ordering cars from the two carriers serving it. The effect of this rule is to make the maximum daily rating of a joint mine from each of the two carriers serving it the difference between its total capacity to load coal and the tonnage tendered by it for transportation over the other carrier. That is to say, if a joint mine having a gross daily capacity of 100 carloads of coal tenders 75 carloads to one of the two carriers serving it on a given day, its rating that day on that carrier is 75 carloads, while its maximum rating that day on the other carrier is 25 carloads. By holding that the 100 per cent rule is not in principle unjust or unreasonable the Commission in effect found that the application of the formula above described determines the just and reasonable ratings of a joint mine ordering cars from two carriers from day to day.

(*c*) The remaining section of the law (section 3, paragraph 1), alleged to have been transgressed by the 100 per cent rule, makes it unlawful for any common carrier to make or give any undue preference or advantage to any particular person, locality or description of traffic, or to subject any particular person, locality or description of traffic to undue or unreasonable prejudice or disadvantage. This section of the act does not make all preferences or prejudices unlawful; only those that are undue or unreasonable.

The 100 per cent rule in effect requires a joint mine requesting cars from more than one carrier to accompany its requests for cars with *bona fide,* concomitant tenders of sufficient capacity to load all cars ordered on the particular day for which they are desired for loading. Other rules in effect

make similar requirements of local mines and joint mines which confine their orders to a single carrier. Where is the discrimination or preference, let alone discrimination or preference of a character which could be said to be undue or unreasonable? If, as a result of the manner in which a joint mine voluntarily divides its orders for cars between the roads serving it, it receives a lesser number of cars on a given day than a local mine of the same capacity or some joint mine of the same capacity which does not split its daily orders, who is to determine whether the resulting difference in car supply is unduly preferential or unreasonably prejudicial? The Commission, of course. It was to decide such questions that the Commission was created. The law prescribes no formula for determining whether a given discrimination, preference, or prejudice in rates or car supply is due or undue, reasonable or unreasonable.

4. The questions whether a request for cars made under certain circumstances and conditions is reasonable or unreasonable; whether a rule of car distribution is just or unjust; whether a rule for determining the car-ordering ratings of joint mines tendering coal to two or more carriers from day to day results in ratings just or unjust, reasonable or unreasonable, and whether a certain prejudice or disadvantage in car supply is due or undue, are questions of fact within the administrative functions and power of the Commission to determine.

Interstate Commerce Commission v. Illinois C. R. Co., 215 U. S., 452.

Baltimore & Ohio R. Co. v. United States ex rel. Pitcairn Coal Co., 215 U. S., 481.

Morrisdale Coal Co. v. Penna. R. R. Co., 230 U. S., 304.

Pennsylvania R. Co. v. Puritan Coal Min. Co., 237 U. S., 121.

Pennsylvania R. Co. v. Clark Bros. C. M. Co., 238 U. S., 455.

Loomis v. Lehigh Valley R. Co., 240 U. S., 42.

Pennsylvania R. Co. v. Sonman S. C. Co., 242 U. S., 120.

Pennsylvania R. Co. v. Stineman Coal Min. Co., 242 U. S., 298.

Director General of Railroads v. Viscose Co., 254 U. S., 498.

Seaboard Air Line Railway Co. v. United States, 254 U. S., 57, 61.

Pennsylvania R. Co. v. United States, 236 U. S., 351, 361.

Skinner & Eddy Corp. v. United States, 249 U. S., 557, 562.

Interstate Commerce Commission v. Louisville & N. R. Co., 227 U. S., 88.

Pre-Cooling Case (*Atchison, T. & S. F. R. Co. v. United States*), 232 U. S., 199.

Los Angeles Switching Case (*Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.*), 234 U. S., 194, 311-312.

Manufacturers R. Co. v. United States, 246 U. S., 457, 482.

Kansas City Southern R. Co. v. United States, 231 U. S., 423, 440.

Proctor & Gamble Co. v. United States, 225 U. S., 282, 297-298.

Interstate Commerce Commission v. Union P. R. Co., 222 U. S., 541.

Interstate Commerce Commission v. Delaware, L. & W. R. Co., 220 U. S., 235.

In the first case above cited, certain railroads assailed an order of the Commission requiring them to count company fuel cars against the distributive shares of the mines to which they were allotted. It was claimed that such a requirement would result in discrimination against the mines from which the railroads purchased their fuel coal. Answering this contention and holding that it was within the power of the Commission to prescribe car-distribution rules, the court said, at page 478:

> "At best, these arguments but suggest the complexity of the subject, and the difficulty involved in making any order which may not be amenable to the criticism that it leads to or may beget some inequality. Indeed, the arguments just stated, and others of a like character which we do not deem it essential to specially refer to, but assail the wisdom of Congress in conferring upon the Commission the power which has been lodged in that body to consider complaints as to the violations of the statute, and to correct them if found to exist, or attack as crude or inexpedient the action of the Commission in performance of the administrative functions vested in it, and upon such assumption invoke the exercise of unwarranted judicial power to correct the assumed evils."

In the next case, *Pitcairn case,* the question was whether the Commission or the courts could pass upon the lawfulness of car-distribution rules and prescribe new rules for the future. The rules for rating coal mines on the Baltimore & Ohio Railroad took into consideration, first, the capacity of the mines to produce coal and, second, the previous shipments by the mines for a period of two years. After the mines were so rated, there were certain deductions made from the general pool of cars. For example, cars for Baltimore & Ohio fuel coal were deducted. New mines were allotted an arbitrary number of cars for development; foreign cars for foreign railroad fuel were deducted; private cars were also deducted. There were other exceptions, one of which is peculiarly interesting here and which was referred to by the Supreme Court, page 485, as follows:

> "When mines are connected with foreign railroads as well as with the Baltimore & Ohio, their rating is reduced 50 per cent. A similar reduction is made in cases where mines are located near rivers and are equipped for loading boats."

As the quoted exception indicates, it was a rule applicable to joint mines and limited the orders of such mines on the Baltimore & Ohio to 50 per cent of their ratings. It was these rules, including the joint-mine rule, which was attacked in the court below, but the Supreme Court held (page 493) that "the grievances complained of were primarily within the administrative competency of the Interstate Commerce Commission, and not subject to be judicially enforced."

In the *Morrisdale case, supra,* a coal company sought to recover damages from the railroad company for alleged vio-

lations of Section 3 of the Interstate Commerce Act in the distribution of coal cars. At pages 312-313 the court said:

> "The prohibitions of section 3 of the Commerce Act require that cars shall be fairly allotted to shippers without unjust discrimination or unfair preference. But the statute does not define what is the proper method of distribution in case of our shortage, * * *
>
> "* * * the question as to the reasonableness of a rule of car distribution is administrative in its character and calls for the exercise of the powers and discretion conferred by Congress upon the Commission. It was distinctly so ruled in the Pitcairn Case, 215 U. S., 481, and in I. C. C. *v.* Illinois Central, 215 U. S., 452. Those cases involve a consideration of the power of the Commission over the distribution of cars and held that the courts could not by mandamus compel it to make a rule, nor by injunction restrain the enforcement of one it had promulgated. If in those direct proceedings the courts could not pass upon the question of reasonbleness of a method of allotting cars neither can it do so as an incident to an action for damages.
>
> In view of the decision in the Abilene, Pitcairn and Robinson cases it is unnecessary again to discuss the statute or do more than say that in this case the plaintiff was not entitled to maintain its action without producing an order of the Commission that the rule adopted by the Pennsylvania Railroad was unreasonable."

In the *Puritan Coal Co. case, supra,* the court referred to the authority of the Commission over car-distribution rules as follows, at page 131:

> "But it must be borne in mind that there are two forms of discrimination—one in the rule and the other in the manner of its enforcement; one in promulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule. In a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission. It is for that body to say whether such a rule unjustly discriminates against one class of shippers in favor of another. Until that body has declared the practice to be discriminatory and unjust no court has jurisdiction of a suit against an interstate carrier for damages occasioned by its enforcement * * *."

In the *Clark Bros. case, supra,* the court stated at pages 468-469:

> "The question whether the rule or method of car distribution practiced by the railroad company was unjustly discriminatory was one which the Commission had authority to pass upon. Inter. Comm. Comm. *v.* Ill. Cent. R. R., 215 U. S., 452; Same *v.* Chicago & C. R. R., 215 U. S., 479; Morrisdale Coal Co. *v.* Penna. R. R., 230 U. S., 304, 313; Penna. R. R. *v.* Puritan Coal Co., 237 U. S., 121, 131. Further, by reason of the nature of the question involved in an attack upon the rule or method of the company in distributing cars, no action was maintainable in any court to recover damages alleged to have been inflicted thereby until the Commission had made its finding as to the reasonableness of the rule."

In *Director General of Railroads v. Viscose Co., supra,* this Honorable Court (by a vote of 5 to 4) went to the ap-

parently extreme limit in upholding the necessity of exclusive administrative authority of the Commission in matters of the nature here in issue. In that case, it appeared that the Director General of Railroads (the case arose during Federal Control) had amended the appropriate tariff schedules, cancelling all rates on silk and declaring that thereafter silk "will not be accepted for shipment," although such rates had been in effect and silk had been transported as freight for many years prior thereto. Without resorting to the Commission, the Viscose Company applied for and obtained a temporary, and later a permanent, injunction from a District Court, restraining the Director General from putting the amended schedule into effect and from refusing to accept silk for transportation. Upon appeal to the Circuit Court of Appeals, the question whether the District Court had any jurisdiction in the premises was certified to this court. The Viscose Company argued that for a common carrier to exclude a commodity from its tariffs and to refuse to accept it for shipment was neither classification nor regulation, but a plain violation of its common-law and statutory duty. But this Honorable Court answered the question certified in the negative, held that the exclusion of silk from the tariffs was a matter of classification the unreasonableness of which was for the Commission to determine, and reiterated——

> "The importance to the commerce of the country of the exclusive initial jurisdiction which Congress has committed to the Interstate Commerce Commission," etc.

Thus, the Commission is held to have the power and authority to approve or prescribe a rule or regulation under

which a railroad would be absolved from the duty of accepting a certain commodity for transportation. In other words, the Commission has the power to approve or prescribe a rule whereby what appellees herein denominate as a "legal and common-law right" to demand the transportation of a certain commodity is denied. With such a power, the Commission is certainly authorized to approve or prescribe the 100 per cent rule here involved. Clothed with power so to classify freight as to authorize carriers to deny the use of their facilities for the transportation of certain commodities, it is well within the limits of its authority when it approves or prescribes a rule which, falling far short of authorizing carriers to refuse to accept coal for shipment, merely lays down the conditions under which the cars available for its transportation will be divided among the shippers during periods of car shortage.

III.

Regardless of Whether the Commission's Order of December 11, 1922, was in Effect an Affirmative Prescription of the Hundred Per Cent Rule, the District Court Erred in Enjoining Either the Order or the Rule.

1. It is clear that the questions whether the 100 per cent rule was just or unjust, reasonable or unreasonable, or whether it operated to the undue prejudice of the joint-mine operators or the unreasonable advantage of the local-mine operators were administrative in character and therefore within the jurisdiction of the Commission to determine. After long drawn-out hearings and two separate oral argu-

ments, the Commission found that the 100 per cent rule was not unjust, unreasonable or unduly prejudicial to the joint-mine operators. This finding of the Commission was final and not subject to review by the District Court, unless there was some irregularity in the proceedings before the Commission, a lack of substantial evidence supporting the decision, or the Commission's action was arbitrary or transcended the legitimate bounds of its authority. *Cases cited on pages* 54-56 *hereof.*

The bill filed by complainants in the court below refers to no irregularity in the proceedings before the Commission, and makes no allegation that the decision of the Commission was unsupported by substantial evidence. And, even though the bill did contain such charges, they would constitute no ground for enjoining the Commission's order because the record and evidence upon which the Commission acted was not introduced in the court below and is therefore not part of the record in this court.

Louisiana & Pine Bluff R. Co. v. United States, 257 U. S., 114.

Edward Hines Yellow Pine Trustees v. United States, 263 U. S., 143.

It follows that the only ground upon which the District Court could properly have enjoined the Commission's order was that the action of the Commission was arbitrary and transcended the legitimate bounds of its administrative authority.

2. The bill charged and the complainants below contended that the action of the Commission was arbitrary and beyond its powers because (*a*) it was predicated upon a desire to ad-

just or equalize labor conditions between mines; (*b*) the decision and rule authorizes and requires carriers serving a joint mine to consult with each other regarding the tenders made by a joint mine; (*c*) the decision, order and 100 per cent rule are discriminatory against joint-mine shippers as compared with joint shippers of other commodities; and (*d*) the rule deprives a joint mine of its advantages of location. These charges and contentions will be considered in the foregoing order.

(*a*) The only basis for the charge that the action of the Commission was predicated upon a desire to adjust or equalize labor conditions between mines is the following words in the second report of the Commission (Record, 40):

> "There has been extreme dissatisfaction in the ranks of mine labor, accentuated, in any event, by inequalities in opportunities for working time and wages. The results of such disturbed labor conditions have been harmful to the carriers and to shippers."

The contention based upon the foregoing words is frivolous. The Commission entered no order designed or intended to equalize the running time of coal mines or to quiet labor dissatisfaction. In their petition to reopen the cases before the Commission, the joint-mine operators, appellees here, in effect conceded that the Commission did not predicate its action in dismissing the complaints and approving the 100 per cent rule upon any finding, conclusion or opinion that the running time and labor supply of joint mines or local mines should be equalized, or upon any purpose, design or intent to bring about such equalization (Record, 101, 109, 118-119). In this connection, the dissenting memorandum

of Commissioner Potter may not be referred to as indicating the ground of the Commission's action.

Interstate Commerce Commission v. Delaware, L. & W. Ry. Co., 220 U. S., 235, 251-252.

While there is nothing in the order or report of the Commission designed or intended to equalize the running time of joint mines and local mines or otherwise to quiet the dissatisfaction of mine labor usually incident to unequal running time, the Commission unquestionably has the power, indeed it is its duty, to consider circumstances affecting the welfare of the public and the parties in passing upon the question whether the discrimination or prejudice alleged to result from the rate, rule or practice complained of is undue or unreasonable.

Texas & P. Ry. Co. v. Interstate Commerce Commission, 162 U. S., 197, 219.

Interstate Commerce Commission v. Chicago, R. I. & P. R. Co., 218 U. S., 88, 103.

As the court said in the first of these two cases:

> "* * * all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers, and consumers should be considered by the tribunal appointed to carry into effect and enforce the provisions of the act."

Paragraph 1 of Section 3 of the act prohibits undue preference to one person or locality and undue prejudice to another person or locality *in any respect whatsoever*. The joint-mine operators contended before the Commission that

during periods of car shortage, when they ordered cars from two carriers, they should be allotted *pro rata* shares of the cars on the basis of ratings equivalent to 200 or 150 per cent of the actual ratings of their mines. The local-mine operators contended that, to the extent the joint mines were allotted cars on the basis of ratings in excess of 100 per cent of their actual ratings, the result was unduly preferential to the joint mines and unduly prejudicial to the local mines for the reason, among others, that the joint mines were thereby accorded such a tremendous advantage in running time that they eventually deprived the local mines of their labor supply. The running time of joint mines on the 100 per cent rule is measurably greater than that of local mines. The local-mine operators conceded before the Commission, and still concede, that the joint-mine operators are entitled to this advantage of greater running time on account of the geographic advantage of location of their mines on more than one railroad, but the joint-mine operators are not entitled to the still further and additional running time incident to the operation of the 150 per cent rule. *Nothing in the order, ruling and report of the Commission deprives, or attempts to deprive, the joint-mine operators of their advantage in running time incident to the operation of the 100 per cent rule.*

Evidence of the effect of disproportionate running time of coal mines was considered by the Commission in *Traer v. Chicago & Alton Railroad Co.*, 13 I. C. C., 451, wherein some features of the so-called assigned car practice were condemned. One of the defendant carriers undertook to enjoin the Commission's order. The Commission defended and set up in its answer to the bill the grounds upon which

its order rested. The case finally reached this court, where the order of the Commission was upheld on the ground that it was within the power of the Commission. *Interstate Commerce Com. v. Illinois C. R. Co.*, 215 U. S., 452. One of the grounds alleged in the Commission's answer and referred to in the opinion of this court was (page 407, in margin):

> "That the operator receiving the foreign railway fuel cars, private cars, or company fuel cars is enabled thereby to secure and hold a larger, more efficient and regular working force of miners and laborers."

(*b*) By Article 24 of the bill of complaint, it is alleged that the 100 per cent rule has the effect of authorizing and requiring each of two competing and independent carriers to act in combination one with the other to refuse any transportation of coal tendered to it if tendered to the other carrier, and that such "combination" is in restraint of trade and contrary to the laws of the United States and the State of West Virginia.

As it is ordinarily impossible for a mine to produce coal until railroad cars are placed under the tipple, it is impossible for it to make an actual tender of coal for shipment before the cars are received. For this reason, a constructive tender predicated on the demonstrated capacity of the mine to produce and load coal is permitted. In the nature of things, there is no way for a local mine to misrepresent the quantity of coal which it can make ready for shipment from day to day and thereby to secure more than its proper *pro rata* share of the available cars; its rating on the single carrier serving it constitutes an effective bar to any such at-

tempt. On the other hand, it is possible for a joint mine, by ordering more than its gross rating of cars from the two or more carriers serving it, to misrepresent the aggregate quantity of coal which it can make ready for shipment from day to day and thereby to secure more than its proper *pro rata* shares of the available cars during periods of car shortage.

By paragraph 4 of Section 10 of the Interstate Commerce Act (25 Stat. L., 855), it is made unlawful for a shipper by payment of money *or otherwise* to induce or attempt to induce any common carrier to unjustly discriminate in his favor as against any other shipper. To police the orders of joint mines was one of the purposes of the 100 per cent rule; it was merely the means adopted by the carriers to prevent joint mines from misrepresenting the quantity of coal which they have ready for shipment from day to day and thereby to prevent them from securing unfair advantages in car supply over local mines and joint mines which tender their coal to single carriers.

As a police regulation, the 100 per cent rule is similar in purpose and effect to numerous other police regulations maintained and enforced by carriers such as weighing and inspection bureaus, and the rules and regulations governing transit privileges at junction points between two or more carriers.

(*c*) By Article XXII of the bill of complaint, it is alleged that the decision and order of the Commission and the 100 per cent rule are discriminatory against complainants as shippers of coal "as against shippers of other classes of merchandise" located on two or more railroads. While

the allegation does not so charge, it implies that a shipper of other classes of merchandise who is located on two railroads may place orders for cars with both roads beyond his capacity to load on a given day, *i. e.*, that he may accompany his requests for cars with tenders which are partially genuine and partially fictitious and have the same consideration given to the fictitious as to the genuine tenders. The Commission has passed upon this question so far as shippers of other classes of merchandise are concerned and has uniformly held that in times of car shortage no shipper has the right to receive cars based on orders for cars in excess of his capacity to load on a given day.

California Fruit Growers Exchange v. S. P. Co., 12 I. C. C., 553.

Railroad Commission of Iowa v. C., R. I. & P. Ry. Co., 29 I. C. C., 396.

Farmers Elevator Co. v. C., M. & St. P. Ry. Co., 47 I. C. C., 475.

Tanner & Co. v. C., B. & Q. R. R. Co., 53 I. C. C., 401.

Wausau Southern Lumber Co. v. G. & S. I. R. R. Co., 64 I. C. C., 732.

In the first of these cases, the Commission declined to condemn a rule providing that, in times of car shortage, cars for the transportation of oranges shall be divided among the shippers in proportion to the quantity of fruit which they have picked and placed in the packing houses at the time of the demand for cars. In its report (page 565) the Commission referred to the rule regarding requests for coal cars and stated—

> "A mine cannot in good faith ask for more cars than it can load."

In the next three cases, the Commission approved or prescribed rules providing that, in times of car shortage, cars for the transportation of grain shall be divided *pro rata* among the shippers in accordance with the quantity of grain which they have in the elevators ready for immediate shipment. In the *Tanner case, supra,* the Commission again referred (page 406) to the rule regarding coal-car distribution, and said—

> "Coal is shipped as mined *and the amount that may be considered ready for shipment is the amount that can be mined, loaded and forwarded from day to day.*"

In the last case, the Commission held that, in times of car shortage, cars for the transportation of lumber should be divided among the mills in accordance with the quantity of stock conveniently located for prompt loading and shipment.

Furthermore, the allegation in the bill does not state who are the "shippers of other classes of merchandise," nor what commodities they ship, nor what kind of cars they use, nor whether they compete with complainants (appellees here) and other shippers of coal for trade or cars. The Commission has held that in the absence of competition there can be no discrimination which is prohibited by the Act.

Board of Trade of Chicago v. A., T. & S. F. Ry. C., 29 I. C. C., 438, 443.

Portsmouth Association of Commerce v. S. A. L. Ry. Co., 55 I. C. C., 377, 380.

And no issue of discrimination as between shippers of coal, on the one hand, and "shippers of other classes of merchandise," on the other, was presented in the complaints filed with the Commission.

(*d*) Lastly, it is insisted that the effect of the operation of the 100 per cent rule is to deprive joint mines of their advantage of location on two railroads. This appears to be the basis of the decision below. Note the following language of the court (Record, 128, herein):

> The shipper of any commodity who has access to more than one carrier has a right to choose one carrier, or to divide his goods among two or more carriers, with the advantages naturally belonging to such location, giving such access; and while the Interstate Commerce Commission has, under the law, certain powers of regulation, yet it is beyond such powers to deprive the shipper of such right, under the guise of regulation, or to limit such right in such way as to amount to the deprivation thereof.
>
> * * * * * * *
>
> A so-called regulation which destroys at least thirty per cent of the market value of a coal property, certainly transcends such authority. It is a taking of private property without due process of law, by depriving the owner of the power to use it in a legitimate and proper way, for the commercial purpose for which it was designed and developed, etc.

But neither of the rights of a joint-mine shipper, referred to in the first sentence of the foregoing findings of the court below, is negatived by the 100 per cent rule. Indeed, each of those rights is fully protected by the 100 per cent rule.

Under this rule, a joint-mine operator is not deprived of his right "to choose one carrier, or to divide his goods among two or more carriers." Under this rule, a joint-mine operator may tender the entire output of his mine to any of the carriers serving it; he may tender it to the particular carrier having the greatest car supply from day to day and in that way secure for his mine more cars in the aggregate during a given period than a local mine of the same rating on either road. In other words, he may "switch" his orders back and forth between the carriers serving his mine, picking and choosing the particular carrier likely to have the best car supply from day to day. So, too, he may "split" his tender between the two or more roads serving his mine in any manner he may choose. There is nothing in the 100 per cent rule which deprives joint-mine operators of these rights.

Furthermore, there is nothing in the rule which deprives joint-mine operators of the right at any time to ship their coal to markets on either or all of the carriers serving their mines. There is nothing in the rule to prevent them at any time from routing their coal via the carrier with the lowest rates or the best service.

That the 100 per cent rule does not deprive joint mines of their advantages of location, but in fact accords them such advantages, was clearly shown before the Commission and appears in the record of the case in this court. In the first report of the Commission (record, 29, herein), it was found (as set out in statement form at record, page 92, herein) that during the month of August, 1920, *when the 100 per cent rule was in effect,* the joint mines of the New River Company, appellees here, received a 9.7 per cent better car supply

on the average than did local mines with like ratings on the same roads serving the joint mines.

Furthermore, *since the promulgation of the 100 per cent rule,* numerous complaints have been filed with the Commission by local mine operators to compel the railroads to treat their mines as joint mines in order to secure the very advantages which appellees here claim are negatived by the 100 per cent rule. These complaints have been determined. (See Record, 117, herein.)

Ridge Coal Mining Co. v. M. P. R. R. Co., 62 I. C. C., 259.

Dering Mines Co. v. Director General, 62 I. C. C., 265.

Hillsboro Coal Co. v. C., C. C. & St. L. Ry. Co., 63 I. C. C., 401.

Benton Coal Mining Co. v. C., B. & Q. R. R. Co., 63 I. C. C., 396.

Franklin County Mining Co. v. C., B. & Q. R. R. Co., 63 I. C. C., 396.

Cameron Coal Co. v. M. & E. R. R. Co., 63 I. C. C., 434.

In the first named of these cases the Commission specifically found that—

> Joint mines are treated by carriers in the matter of car supply and other transportation services, the same as mines physically located on more than one railroad. Thus in times of car shortage a joint mine may draw cars from each of the railroads to which the mine is joint, whereas a local mine is limited in its supply to the only line serving it. * * *
>
> *"The record establishes that a joint or junction*

point mine has a decided advantage over a local mine in the matter of car supply as well as in other respects." (Italics mine.)

In the *Dering Mines Company case, supra,* the Commission found that—

> "The advantages which would accrue to the complainants if they should prevail would be a better car supply in times of car shortage, due to the opportunity they would then have to draw cars from both lines; an additional route to Chicago and other points reached by both lines; and access by each mine to local markets on both lines instead of only the local markets on its one line as at present. * * * The benefit chiefly sought by complainants, however, is better car supply to the joint mine in times of car shortage. *The record shows that the joint mine has an advantage in this respect.*" (Italics mine.)

And in its second report of the case, which led to the present litigation, the Commission found (record, 36, herein) that—

> "Certain joint mines in Illinois and Indiana have expended large sums of money to secure connections with more than one road"—

although the 100 per cent rule was then, and still is, in effect in those States. The Commission found further (record, 36, herein):

> "It is admitted by all that the joint mine enjoys advantages not possessed by the local mine, and has the right to so place its orders as to void, if it can, embargoes and congestion of traffic on particular

> roads. It has available a more extensive and more varied market for its coal. It may at times be able to dispose of its product upon the second line of railroad, while the mine local to the first road is unable to market its output. In case of car shortage the joint mine is able to select the outlet which affords the best and most liberal means of transportation. These are important advantages to which the joint mine is entitled and in the reasonable enjoyment of which it should be protected."

But the joint-mine operators (appellees here) contended before the Commission and in the court below that, when they enter into contracts to ship coal to consumers located on a railroad having a poor car supply, the 100 per cent rule deprives them of their advantages of location on two railroads. In such case, a joint mine may secure a lesser number of cars in the aggregate than a local mine of the same rating on a road of greater car supply. But such result is not the result of the operation of the 100 per cent rule; the rule does not require a joint mine to order 100 or any other specified per cent of its cars from any particular road, much less the road of poor car supply. The result is the natural consequence of the joint-mine operator's voluntary act of choice in disposing of his coal (perhaps at a better price) to a consumer on a road of poor car supply. In other words, the joint-mine operator's own voluntary act, not the 100 per cent rule, is the proximate cause of the resulting poor car supply of his mine. As the Commission said in its second report in the case which culminated in this litigation (Record, 36-37):

> "Whenever the joint mine orders cars from the different carriers serving it, it is doubtless due to other compensating advantages which outweigh those of a temporary greater car supply, *and such election is the voluntary choice of the shipper.*" (Italics mine.)

In *Rice v. Louisville & Nashville R. R. Co.*, 1 Int. Com. Rep., 722, 738, the Commission was called upon to decide whether it was unduly prejudicial for carriers to charge the same rates on oil in barrels as on oil in tank cars, *i. e.*, to charge the shippers of oil in barrels for the transportation of the barrels, and not to charge shippers of oil in tank cars for the movement of the tanks. Chairman Cooley, who was to the Interstate Commerce Act what Chief Justice Marshall was to the Constitution, said:

> "This assumption makes the resort to the one method of transportation rather than the other a matter purely of voluntary choice on the part of the shipper, and if the argument is correct in further assuming that the two methods are equally open to all who usually engage in the business, it may justly be urged with very great force that the party resorting to the one is by the choice itself precluded from raising any question of relative reasonableness by comparing the rates he chose with the lesser rate he might have chosen, but did not."

Later the same question came before the Commission again in the case of *Independent Refiners' Asso. v. Western New York & P. R. Co.*, 4 Int. Com. Rep., 162. In this case the complaint was directed against the discrimination in rates and facilities from the Pennsylvania oil fields to New Jersey tide-water ports, and especially to Perth Amboy. It ap-

peared that the complainant shippers shipped their oil in barrels for the reason that the trade to which they sold their product demanded that it be so shipped. However, they complained to the Commission, and the Commission apparently sustained the contention, that although they had elected to ship their oil in barrels, the transportation in tank cars was not open to them impartially. The Commission ordered defendants to cease and desist from charging any rates for the transportation of the barrels or upon reasonable notice to furnish tank cars to complainants, and awarded reparation on past shipments in barrels. The defendants declined to obey the order or to pay the reparation. Suit to recover the reparation was instituted and the case finally reached the Supreme Court, which affirmed the decree of the Circuit Court of Appeals reversing the judgment of reparation granted by the court below. *Penn Refining Co. v. Western N. Y. & P. R. Co.*, 208 U. S., 208, 220-221. Among other things the Supreme Court said:

> "It is, therefore, apparent that the failure of plaintiffs to use tank cars during substantially all the period covered by the reparation order was not owing to a refusal or omission of the defendants to supply them on demand, but because they, the plaintiffs, did not demand and could not use them economically for the transportation of oil to Perth Amboy. The opinion of the Commission must be read with reference to this evidence, which, although given on the trial before the court, states the facts existing at Perth Amboy, during the time of investigation by the Commission.
>
> If it be assumed that it was the duty of the railroads to furnish tank cars to those who demanded them while the railroads continued to hire that kind

of car from owners in which to carry their oil, yet the failure to furnish them to a party that did not desire and had not demanded them certainly ought not to render it necessary for the railroads to carry the barrel package free because no charge was made for the tank package. The Commission said it may be conceded that the amount of paying freight was materially greater in tank than in barrel shipments, and that the tank car, after adding the gross weight of the car and oil, pays slightly more to the carrier per ton than the stock car with its full load of oil barrels. Nevertheless, it was stated that the facts already adverted to make out a case of unjust discrimination between the tank and a barrel shipper, and it was so adjudged in this case, where a shipper did not use or demand a tank car.

We are unable to concur in this view. Because circumstances existed which prevented the economical use of the tank car by plaintiffs (no demand being made for the use of a tank car) is no ground for finding discrimination in the charge for the weight of the barrel package (such charge being in itself not an unreasonable one) while none is made for the tank containing the oil. It might be different if plaintiffs desired tank cars and defendants failed to provide them on demand."

The foregoing decision of this Court is peculiarly applicable to the example of a joint-mine operator who orders all or the major portion of his cars from the line having the poorest car supply. The right to order all or the major portion of his cars from the line having the greatest car supply is open to him but, if he chooses not to exercise it, he can no more complain of the result of his failure than the shipper of oil in barrels could complain of the result of his failure to

order tank cars. In both cases the discrimination in car supply is the direct result of the voluntary acts of the shippers. This Court said, in *Interstate Commerce Commission v. Diffenbaugh*, 222 U. S., 43, 46, that—

> "The law does not attempt to equalize fortune, opportunities, or abilities."

It is apparent from these considerations that the court below erred in assuming that the 100 per cent rule deprived joint mines of any of their rights or advantages of location on two or more railroads. It is respectfully submitted that the majority decision of the District Court for the Middle District of Pennsylvania in *Pennsylvania R. R. Co. v. United States*, — Fed., —, cited by the court below in the present case, has no application to the issue here involved. There, the issue was whether it was unlawful for certain railroads to maintain reciprocal trackage arrangements in one section of York, Pa. (thus giving the industrial plants located therein on a single railroad a joint status on two railroads), while contemporaneously refusing to maintain similar arrangements in other and competing sections of the same city; here the issue is the legality of a car-distribution rule applicable to mines as to whose joint status no question is raised. In the *York case* no rule, regulation or practice applicable to the industries within the favored zone was in issue; here that is the only question involved.

IV.

The Action of the District Court in Substituting its Judgment for that of the Commission has Created Discriminatory Situations Wholly Incompatible with the Interstate Commerce Act.

1. The order of December 11, 1922, was entered by the Commission in its dockets numbered 12362 and 12399, collectively known as the *Bell & Zoller Coal Co. case,* and its dockets 12081, 12082, 12083 and 12084, collectively known as the *Fairmont & Cleveland Coal Co. case* (Record, 41). The following railroads were defendants in the first two numbered dockets (Record, 68):

Baltimore & Ohio Southwestern Railroad,
Chicago, Peoria & St. Louis Railroad,
Cincinnati, Indianapolis & Western Railroad,
Chicago & Eastern Illinois Railroad,
Chicago & Northwestern Railway,
Chicago, Burlington & Quincy Railroad,
Chicago & Alton Railroad,
Chicago, Indianapolis & Louisville Railway,
Chicago, Terre Haute & Southeastern Railway,
Cleveland, Cincinnati, Chicago & St. Louis Railway,
Illinois Central Railroad,
Louisville & Nashville Railroad,
Missouri Pacific Railroad,
Pittsburgh, Cincinnati, Chicago & St. Louis Railway,
Southern Railway,

and the following railroads in the last four numbered dockets (Record, 41):

Baltimore & Ohio Railroad,
Monongahela Railway,
Virginian Railway,
Chesapeake & Ohio Railway.

The first decision of the Commission in the *Fairmont & Cleveland Coal Co. case* did not apply to the railroads defendants in the *Bell & Zoller Coal Company case,* nor to any other railroads except the last four above named. As the application to change the 100 per cent rule of the railroads defendants in the *Bell & Zoller Coal Company case* was denied by the Commission, it may be presumed that those railroads have continued to maintain and apply the 100 per cent rule. Of the four railroads defendants in the *Fairmont & Cleveland Coal Co. case* the Baltimore & Ohio and Monongahela restored the 100 per cent rule on December 11, 1922, and January 4, 1923, respectively (Record, 71). The Virginian Railway and the Chesapeake & Ohio were enjoined from restoring it by the order and decree of the court below in this proceeding.

Thus, while the decision and order of the Commission found that the 100 per cent rule was not unjust and unreasonable or unduly prejudicial on the 19 railroads defendants in all of these cases and whose lines run from the Atlantic Seaboard to the Rocky Mountains, the court below has substituted its judgment for the judgment of the Commission in respect to the rule in so far as it is applicable on two of these roads.

This Court will take judicial notice of the fact that the Virginian and the Chesapeake & Ohio operate lines to Hamp-

ton Roads, that the Baltimore & Ohio operates lines to Baltimore, Philadelphia and New York, and that the coals produced along all three of these roads compete in the export trade and in coastwise movement to New England markets. This Court will also take judicial notice of the fact that the Chesapeake & Ohio and Baltimore & Ohio and their connections operate lines to points in Ohio, Michigan, Indiana and Illinois and that the railways which were defendants in the *Bell & Zoller Coal Co. case* also operate lines in those States, and that the coals produced along all these roads compete in common markets, especially in what is known as the central competitive field north of the Ohio River. In any event, this Court will take judicial notice of reports of the Interstate Commerce Commission to the foregoing effect. *Bituminous Coal to C. F. A. Territory,* 46 I. C. C., 56; *Lake Cargo Coal Rates,* 46 I. C. C., 159.

2. The action of the court below in substituting its judgment for the judgment of the Commission has therefore created this anomalous situation. Two railroads operating in West Virginia have been enjoined by the court below from establishing and enforcing a rule of coal-car distribution which 17 other and competing railroads in the same and other States are maintaining and applying pursuant to a ruling and decision of the Commission declining to change it. There is thus presented a direct conflict of view and authority between the courts and the Commission in respect to the propriety and reasonableness of a rule of coal-car distribution, and the rule involved is clearly one as to which uniformity of administrative action is necessary.

The situation created by the action of the court below in substituting its judgment for that of the Commission is strik-

ingly similar to that used by this Honorable Court in the *Pitcairn case, supra,* to illustrate the impossibility of reconciling the spirit and purpose of the Interstate Commerce Act with interference by the courts with the administrative functions of the tribunal delegated to enforce that act. As hereinbefore indicated, coal-car distribution rules, including the rule applicable to joint mines, was the subject-matter of the litigation in the *Pitcairn case.* At pages 494, 495 of its decision in that case this Honorable Court said:

> "Under these circumstances it is apparent, as we have said, that these amendments add to the cogency of the reasoning which led to the conclusion in the Abilene Case, that the primary interference of the courts with the administrative functions of the Commission was wholly incompatible with the act to regulate commerce. This result is easily illustrated. A particular regulation of a carrier engaged in interstate commerce is assailed in the courts as unjustly preferential and discriminatory. Upon the facts found, the complaint is declared to be well founded. The administrative powers of the Commission are invoked concerning a regulation of like character upon a similar complaint. The Commission finds, from the evidence before it, that the regulation is not unjustly discriminatory. Which would prevail? If both, then discrimination and preference would result from the very prevalence of the two methods of procedure. If, on the contrary, the Commission was bound to follow the previous action of the courts, then it is apparent that its power to perform its administrative functions would be curtailed, if not destroyed. On the other hand, if the action of the Commission were to prevail, then the function exercised by the court would not have been judicial in

character, since its final conclusion would be susceptible of being set aside by the action of a mere administrative body. That these illustrations are not imaginary is established not only by this record, but by the record in the case of the Illinois C. R. Co. *v.* Interstate Commerce Commission.

We say this record, because, as has been pointed out, one of the questions which we would be called upon to decide if the merits were open is whether the court below was right in holding that if anything but the physical capacity of a mine was taken into consideration by a railroad company in rating the mine for car distribution in time of car shortage, the act to regulate commerce would be violated, and therefore the system adopted by the Baltimore & Ohio Railroad Company was repugnant to the act, because it made not alone the physical capacity, but past shipments, factors to be considered. But the reports of the Interstate Commerce Commission show that, on a complaint made to that body on the subject of the system of mine rating of the Baltimore & Ohio Railroad Company, the Commission, before the decision of the Circuit Court of Appeals in this case was announced, had expressly refused to hold that the system was either preferential or prejudicial within the act to regulate commerce."

3. Another anomaly created by the action of the court below is this: The Commission decided that the 100 per cent rule, which limits the orders of a joint mine whether addressed to one or more of the carriers serving it to 100 per cent of its gross daily rating, is not unreasonable or unduly prejudicial. The joint-mine operators, appellees here, appealed to the District Court for the Southern District of West Virginia and claimed that the 100 per cent rule in-

vaded their legal and constitutional rights in that under that rule a joint mine is not permitted to order 100 per cent of its gross daily rating from one carrier on Monday for loading on Tuesday, acquire "credit" for such order, and then order from the other carrier on Monday the difference between the number of cars ordered from the first carrier on Monday and the number actually furnished by that carrier on Tuesday. This is not the so-called 150 per cent rule—it is a rule that has never been in effect on any road at any time so far as the record shows. The District Court, without defining the "rights" of the complainant joint-mine operators in the premises, found that the 100 per cent rule contravened those undefined and unexplained "rights" and enjoined the rule. The Chesapeake & Ohio and Virginian, the railway defendants below, thereupon established *the 150 per cent rule.* Thus, it has come to pass that the railroads in southern West Virginia, enjoined from maintaining the rule in effect on competing railroads, have established a rule which was not contended for by the complainant joint-mine operators and which, for all the opinion of the court below shows, is more than they are entitled to.

And, as a result, the local-mine operators in southern West Virginia are compelled to compete with joint-mine operators privileged to receive *pro rata* shares of the available cars on the basis of 150 per cent of the gross daily ratings of their mines, while the local-mine operators in northern West Virginia, Illinois, and Indiana compete with joint-mine operators whose orders for cars are limited to 100 per cent of their mine ratings. In other words, the car supply of the southern West Virginia local-mine operators is being depleted by the operation of a rule supposed to approximate

the ideas of reasonableness of the District Court, while that of the local-mine operators of northern West Virginia and other districts is being maintained at a level representing the ideas of reasonableness held by the Commission.

V.

The Commission's Order of December 11, 1922, Dismissing the Complaints of the Complainants Below was a Mere Denial of Affirmative Relief Sought in Respect to a Question Within the Authority and Jurisdiction of the Commission and Not Subject to Review by the District Court.

1. The complaints filed with the Commission attacked the 100 per cent rule as unjust and unreasonable in violation of Section 1 and unduly prejudicial in violation of Section 3 of the Interstate Commerce Act. The sole issue before the Commission was therefore the reasonableness and propriety of the 100 per cent rule, and no other rule.

In the first decision, a division composed of three members of the Commission decided the foregoing issue in favor of the complainants, found that the 100 per cent rule was unreasonable and unduly prejudicial to joint mines and unduly preferential to local mines, and held that in the future the defendant carriers should furnish cars to joint mines in accordance with the 150 per cent rule. No order was entered requiring the carriers to establish and put in force the 150 per cent rule, but the division of the Commission concluded its report with these words:

> "We shall expect, however, that the defendants will promptly amend their car service rules so as to conform with our findings and evidence same by filing copies with us."

The two railway defendants promptly established and put in force the 150 per cent rule. Thereupon, the intervening local-mine operators petitioned for reargument, reconsideration and consolidation of the *Fairmont & Cleveland Coal Company cases* with the *Bell & Zoller Coal Company cases.* This petition was granted. It is the practice of the Commission that, when a case which has been decided by a division is reopened for further consideration, the full Commission will take part in the reconsideration. This practice was followed in the case which gave rise to this litigation. After reargument and reconsideration, the full Commission (one member dissenting) held thus in the second report:

> "The present facts considered, we do not conclude upon these records that the rule atacked, Rule 4 of Circular CS-31 Revised, is in principle unreasonable or unduly prejudicial. Our former conclusions in the Fairmont Cases, based upon a mistaken adherence to and extension of the decision in the Illinois cases are reversed."

and entered the order of December 11, 1922. This order was entered not only in the *Fairmont & Cleveland Coal Company cases, but also in the Bell & Zoller Coal Company cases,* and dismissed the complaints in all of the cases. In other words, the same order of dismissal was entered in the *Fairmont & Cleveland Coal Company cases,* although the 150 per cent rule was then in effect on the lines of the de-

fendants in those cases, as was entered in the *Bell & Zoller Coal Company cases*, the defendants in which were still maintaining and applying the 100 per cent rule.

2. Under the circumstances, the final order by the full Commission was a negative order, a mere denial of affirmative relief sought, and not within the jurisdiction of the District Court to review or enjoin.

Proctor & Gamble v. the United States, 225 U. S., 282.
Hooper v. Knapp, 225 U. S., 302.
Lehigh Valley Railroad Co. v. United States, 243 U. S., 412.
B. & O. R. R. Co. et al. v. United States et al., decided March 3, 1924.

In the *Proctor & Gamble case, supra*, this Court was called upon to review the action of the Commerce Court in taking jurisdiction of the case brought by the Proctor & Gamble Company to set aside and annul the order entered by the Commission dismissing the complaint which the Proctor & Gamble Company had filed attacking the practice followed by the railroads in charging demurrage on the private cars of the Proctor & Gamble Company while standing on its private industry tracks. The Commerce Court entertained jurisdiction, but dismissed the bill on the merits. But upon appeal this Court held that, as the order of the Commission was merely a negative order, it was not subject to review by the Commerce Court. This conclusion was reached upon a consideration not only of the specific language of the act giving the Commerce Court jurisdiction in certain cases, but also of the spirit and purpose of that act as part of the regu-

lating machinery. In other words, the Court proceeded to demonstrate—

> "that to give to the statute a meaning contrary to that which we have found results from its text, and therefore to recognize the existence in the Court below of the power which it deemed it possessed, would result in frustrating legislative public policy which led to the adoption of the Act to Regulate Commerce, would render impossible a resort to the remedies which the statute was enacted to afford, would multiply the evils which the Act to Regulate Commerce was adopted to prevent, and thus bring about disaster by creating confusion and conflict where clearness and unity of action were contemplated."

Speaking of its action in the three cases first above cited, this court said in *B. & O. R. R. Co., et al. v. United States et al., supra:*

> "This court declined to interfere, because to do so would have involved exercise by it of the administrative functions of granting relief which the Commission, in the exercise of its jurisdiction, had denied."

3. But it is insisted that the order here in issue, while negative in form, is affirmative in substance. The only basis for this contention is that the second report of the Commission, which was made part of the order, reversed the prior finding that the 100 per cent rule was unjust, unreasonable and unduly prejudicial, and held that the 100 per cent rule is not unjust, unreasonable or unduly prejudicial. Putting aside the fact that the first report was by a division of three members of the Commission while the second report was by

the full Commission, there are several answers to the contention.

In the first place, as hereinbefore explained, the order of December 11, 1922, was entered not only in the *Fairmont & Cleveland Coal Company cases,* but also in the *Bell & Zoller Coal Company cases.* That is to say, identically the same order was entered in all these cases. The order of December 11, 1922, was the only order entered in the *Bell & Zoller Coal Company cases.* There was no previous finding by the full Commission or by a division of the Commission in the *Bell & Zoller Coal Company cases* that the 100 per cent rule was unreasonable or unduly prejudicial or otherwise in contravention of the act. Obviously, therefore, there would be no basis whatsoever for a contention that, considered as an order entered in the *Bell & Zoller Coal Company cases,* the order of December 11, 1922, was an affirmative order in any way, shape or form. Inasmuch as the *Fairmont & Cleveland Coal Company cases* and the *Bell & Zoller Coal Company cases* were consolidated, one report made in all the cases, and identically the same order entered in each and all of them, it must follow that the order of December 11, 1922, was quite as much negative in character and a denial of the affirmative relief sought in the *Fairmont & Cleveland Coal Company cases* as in the *Bell & Zoller Coal Company cases.* Surely, the mere circumstance that the *Fairmont & Cleveland Coal Company cases* passed through one additional stage of procedure before the Commission does not alter the essential characteristics of the order entered. It does not make different what is in fact the same.

Furthermore, the second report by the full Commission must be regarded as a continuation of the proceeding in-

cident to the first report by a division of the Commission. The first report by a division of the Commission was not a final determination of the question presented in the *Fairmont & Cleveland Coal Company cases.* The 100 per cent rule was in effect when the complaints in both sets of cases were filed and, as the Commission reached the final conclusion that that rule is not unreasonable or unduly prejudicial, and as that conclusion referred back to the matters complained of in the complaints and operated upon conditions as they existed when those complaints were filed, the Commission merely dismissed the complaints. In other words, the burden of proof to substantiate the allegations of the complaint was upon the complainants. The complainants failed to sustain the burden, so the Commission dismissed their complaints. As Circuit Judge Woods said in his dissenting opinion below (Record, 131):

> "There was never any order, or even final determination of the Commission to put into effect any rule or to interfere with Rule 4 (the 100 per cent rule) of the railroads. The conclusions announced in its opinion were reopened, reconsidered and changed; but all this was done in one consolidated proceeding, which was never ended until the Commission made the order above quoted. This last order was a final dismissal of the complaints and a refusal to take any action with respect to Rule 4 of the railroads. It was, therefore, a negative order—a mere refusal to interfere with an existing rule. As such it was not reviewable by this court."

In this connection, the action of the Commission in the *Proctor & Gamble case,* which this court held was not sub-

ject to review, had more the semblance of affirmative action than the report and order of the Commission involved in the present proceeding. In its decision in the *Proctor & Gamble Company case,* which is reported at 19 I. C. C., 556, the Commission clearly indicated that the failure of the roads to charge demurrage on private cars while standing on the owner's private track would be unjustly discriminatory and therefore unlawful. For example, on page 588 of its report, the Commission said:

> *"Surely any arrangement for the use of private cars which causes, or results in, undue preference or unjust discrimination, is repugnant to the underlying principle, as well as in conflict with the terms, of the act."*

And on page 560:

> "Complainant goes further than to assert its right to be relieved from demurrage on its own cars, when standing upon its own tracks within its own works, and asserts that a privately owned car while standing upon a privately owned track should be free from demurrage, even though the car were owned by one private interest and the track by another private interest. In other words, that owners of private tracks and owners of private cars should be permitted to exchange courtesies, and by mutual consent to relieve cars from the demurrage rules of the carriers. *It seems obvious that the acceptance and application of that theory would involve all of the elements of undue preference and unjust discrimination."* (Emphasis mine.)

Bear in mind that the order entered by the Commission in the *Proctor & Gamble case* merely dismissed the com-

plaint; it did not require the defendant railways to continue charging demurrage on private cars while standing on the owner's private tracks. But the foregoing quotations from the Commission's report certainly indicate that the Commission expected the defendant railways to continue charging such demurrage, and to that extent the order, in the light of the report, might have been considered affirmative in substance. Indeed, this court said (page 287) in its decision that the Commission in dismissing the complaint "made a report declaring that the rules complained of were in no sense in conflict with the act to regulate commerce and, on the contrary, *conform to that act and tend to prevent and repress unlawful preference and discrimination.*"

4. It is interesting to note that the answers filed by the railway defendants to the bill of complaint herein expressly averred that the fear of being subjected to the penalties of the law for violating an affirmative order of the Commission was NOT the reason why they re-established the 100 per cent rule following the decision of the Commission. For example, the answer of the Chesapeake & Ohio Railway expressly states that the fear of damage suits for maintaining the 150 per cent rule was the reason why that railroad reestablished the 100 per cent rule.

In *Lehigh Valley R. R. Co. v. United States, supra,* it appeared that the appellant railroad had petitioned the Commission for permission to continue the ownership and operation of a boat line. Such ownership and operation was made unlawful by the so-called Panama Canal act after a certain date unless authority for continued ownership and operation was obtained from the Commission. The act pro-

vided heavy penalties for railroads owning and operating boat lines without such authority of the Commission. The Commission denied the authority and entered an order dismissing the petition of the railroad. The effect of this order of dismissal was to require the petitioning railroad to dispose of its boat line and the contention was therefore made that the order, while negative in form, was affirmative in substance. But the Supreme Court said, at page 414:

> "The order of the Commission was negative in substance as well as in form. *Proctor & Gamble Co. v. United States,* 225 U. S., 282, 292, 293; 56 L. Ed., 1901, 1095; 32 Sup. Ct. Rep., 761. The risk to which the railroad was left subject did not come from the order, but from the above-mentioned section of the Panama Canal act, amending Sec. 5 of the Act to Regulate Commerce (24 Stat. at L., 380; chap. 104, Comp. Stat. 1913, sec. 8567), making each day of violation a separate offense, and the provision of the latter act, Sec. 10, which imposes a possibly large fine. This risk is the same that it was before the order, or that it would have been if appellant had not applied to the Commission, except so far as the findings establish facts that we believe there is no desire to dispute."

The foregoing decision of the Supreme Court is a conclusive answer to the contention that the order here in question is affirmative in substance. The defendant railways herein would be subject to suits for damages for maintaining the 150 per cent rule even though the Commission had never been asked to pass upon the 100 per cent rule.

5. But it is contended that by its decision in the *Proctor & Gamble case* this Court merely intended to hold that the courts have no authority to review a negative order of the Commission in respect to an administrative question only. It is insisted that where, as here, it is alleged that the order of the Commission has the effect of depriving the complainant shippers of their legal or constitutional rights, the courts have jurisdiction. Precisely the same contention was made in the *Proctor & Gamble Company case*. In order to make clear the theory upon which the bill of complaint in that case was based, this court copied the pertinent allegation of the bill in the margin of its decision (page 287). This allegation was as follows:

> "Complainant avers that said order of said Interstate Commerce Commission, in dismissing its complaint as above set forth, is null and void and beyond the power of said Interstate Commerce Commission, in that it sustains the validity of rule 1 of said demurrage; that said rule 1, so far as it provides that privately owned cars under lading on private tracks are in railroad service and subject to the demurrage charges imposed by said tariffs until the lading is removed, is unjust and unreasonable, in that it deprives complainant of the right to use its said private cars upon private tracks for its own purposes without paying the defendant railway companies demurrage charges therefor, after said private cars have been delivered to complainant, and have actually ceased to be engaged in railroad service; that the charges exacted by the defendant railway companies of complainant under said provision of said rule permit said defendants to take complainant's property without compensation, and deprive it of its property without

due process of law, in violation of the Constitution of the United States, and particularly of article 5 in amendment thereof, and that said provision of said rule is in violation of the said act to regulate commerce, and particularly of Sections 1 and 15 thereof, as amended June 29, 1906 (34 Stat. at L., 584, 589; chap. 3591, U. S. Comp. Stat., Supp. 1911, pp. 1284, 1297); that said defendants are now exacting such demurrage charges under the provisions of said rule, and will continue to do so, unless the said order of said Interstate Commerce Commission is set aside and annulled by this court, and defendant railway companies are enjoined from enforcing the provisions of said rule."

It is thus seen that the plaintiff in the *Proctor & Gamble Company case* claimed that its property was being taken without due process of law; in other words, its bill of complaint was quite as broad as the one involved here. On this question this Court said (page 301):

"Some suggestion is made in argument concerning the alleged claim of constitutional right asserted in the petition filed below, and which the court disposed of in the manner we have stated. But what we have said suffices to point out the fallacy which the contention involves, for the following reasons: If the claim of constitutional right concerned a subject which, from its very nature and effect, dominated the act to regulate commerce, and therefore was wholly independent of all questions of right or remedy created by or depending upon that statute, then the issue presented a controversy not cognizable in the Commerce Court, as it could not so be without violating the express reservation and restriction as to the general power of the circuit courts which we

have just quoted. *If, on the other hand, the constitutional question was involved in or depended upon the provisions of the act to regulate commerce, that question, in the nature of things, was subject to the precedent action of the Commission on the subjects committed to it by the act to regulate commerce, and as to which the court had jurisdiction alone to act, in virtue of a prior affirmative order of the Commission.*" (Italics mine.)

Conclusion.

It is respectfully submitted that the 100 per cent rule does not deprive joint mines of any legal right or relieve railroads of any common carrier obligation or duty either at common law or under the Interstate Commerce Act; that, if it is not required by express provisions of the Act, it is within the administrative functions of the Commission to prescribe or approve; that regardless of whether the order of the Commission of December 11, 1922, was in effect an affirmative prescription of the 100 per cent rule, the District Court erred in enjoining the order or the rule; and that the order of December 11, 1922 was in fact a mere negative order—a mere denial of affirmative relief sought—in respect to a question within the jurisdiction of the Commission, and not subject to review by the District Court.

The judgment and decree of the District Court should be reversed.

GEORGE T. BELL,
Solicitor for Appellants in No. 628.

WASHINGTON, D. C., March 22, 1924.